Petition

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No.

IN THE

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SUPREME COURT OF THE UNITED STATES

October Term, 1981

WILLIAM THOMAS ZEIGLER, JR.

PETITIONER,

-v.-

STATE OF FLORIDA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

CHRISTOPHER F. EDLEY, JR.
ELIZABETH BARTHOLET
(Member of the Bar of this Court)
1525 Massachusetts Ave.
Cambridge, MA. 02138
(617) 495-3101

Counsel for Petitioner

TABLE OF CONTENTS

	PAGES (S)
TABLE OF CONTENTS	i
TABLE OF CITATIONS	iii
QUESTIONS PRESENTED	v
CITATION TO OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW	8
REASONS FOR GRANTING THE WRIT	8
I. PETITIONER'S CONVICTION AND SENTENCE OF DEATH WERE BASED IN PART ON EVIDENCE OBTAINED IN VIOLATION OF HIS FOURTH AND FOURTEENTH AMENDMENT RIGHTS.	8
A. The Florida Supreme Court Has Evaded The Clear Holding Of Mincey v. Arizona, 437 U.S. 385 (1978), By Approving A Twelve-Day Warrantless "Crime Scene" Search of Petitioner's Store and Personal Papers.	8
B. The Courts Below Misapplied The Voluntariness Principles Of Schneckloth, Supra, And Townsend v. Sain, 372 U.S. 293, 307-09 (1963), By Holding That Petitioner Gave Valid Written Consent To A Search Of His House From His Hospital Bed, Six Hours After Surgery, Shortly After Administration Of Morphine, Without His Eyeglasses, And Where, Unbeknownst To Petitioner, Police Were Investigating Him As Their Sole Suspect.	14
II. IN ALLOWING THE TRIAL JUDGE TO OVERRULE A JURY RECOMMENDATION OF LIFE IMPRISONMENT AND IMPOSE DEATH, WITHOUT ANY ADDITIONAL EVIDENCE, FLORIDA VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.	15
A. Having Chosen To Involve The Jury In Capital Sentencing, Florida's Use of Judicial Discretion To Displace Jury Findings Of Fact Violated The Defendant's Due Process Rights.	17
B. The Jury's Conclusion As To Sentence, Being Based On A Statutorily-Prescribed Process Of Fact-Finding, Triggers Double Jeopardy Protections Which Were Violated In This Case When The Judge Effectively Retried The Defendants And Overruled The Jury To Impose Death. Bullington v. Missouri, 101 S. Ct. 1852 (1981).	21

III. EXCLUSION OF PETITIONER'S CRUCIAL EXCULPATORY TRUTH SERUM EVIDENCE, AND RELATED EXPERT TESTIMONY, VIOLATED HIS RIGHT TO A FAIR TRIAL BY DENYING HIM ADEQUATE OPPORTUNITY TO ESTABLISH HIS INNOCENCE. 23

CONCLUSION 25

CERTIFICATE OF SERVICE

APPENDICES

A. Text of Opinion Below

B. Text of Florida's Capital Sentencing Statute

C. Table of Jury Roles in Capital Sentencing Statutes

TABLE OF CITATIONS

CASES	PAGE(S)
Alvord v. State, 322 So. 2d 533 (Fla. 1975)	
Arkansas v. Sander, 442 U.S. 753 (1979)	11
Arnett v. Kennedy, 416 U.S. 134 (1974)	19
Beck v. Alabama, 447 U.S. 625 (1980)	16, 21
Bullington v. Missouri, 101 S.Ct. 1852 (1981)	21, 22, 23
Bumper v. North Carolina, 391 U.S. 543 (1968)	12
Burks v. United States, 437 U.S. 1 (1978)	23
Chambers v. Mississippi, 410 U.S. 284 (1973)	24
Clark v. State, 379 So. 2d 372 (Fla. App. 1979)	25
Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971)	10, 11
Culombe v. Connecticut, 367 U.S. 568 (1961)	14, 15
Douglas v. State, 373 So. 2d. 895 (Fla. 1979)	23
Duncan v. Louisiana, 391 U.S. 145 (1968)	20
Furman v. Georgia, 408 U.S. 238 (1972)	16, 23
Gardner v. Florida, 430 U.S. 349 (1977)	16
Godfrey v. Georgia, 446 U.S. 420 (1980)	
Green v. United States, 355 U.S. 184 (1957)	23
Green v. Georgia, 442 U.S. 95 (1979) (per curiam)	24
Gregg v. Georgia, 428 U.S. 153 (1976)	23
Halliwell v. State, 323 So. 2d 557 (Fla. 1975)	
In re Winship, 397 U.S. 358 (1970)	20
Katz v. United States, 389 U.S. 347, 357 (1967)	10, 11
King v. United States, 390 So. 2d 315 (Fla. 1980)	
Lewis v. State, 377 So. 2d 640 (Fla. 1979)	
Love v. State, 242 S.E.2d 278 (Ga. App. 1978)	
Menendez v. State, 368 So. 2d 1278 (Fla. 1978)	
Michigan v. Tyler, 436 U.S. 499 (1978)	12
Mincey v. Arizona, 437 U.S. 385 (1978)	8, 10, 11, 14
Mullaney v. Wilbur, 421 U.S. 684 (1975)	20
Payton v. New York, 445 U.S. 573, 583 (1980)	13

TABLE OF CITATIONS (cont'd)

	PAGE(S)
People v. Torand, 622 P.2d 562 (Colo. 1981) (en banc)	13
Proffitt v. Florida, 428 U.S. 242 (1976)	16, 17
Robbins v. California, 101 S. Ct. 2841 (1981)	13
Schneckloth v. Bustamonte, 412 U.S. 218 (1973)	11, 12, 14
State v. Hurd, 173 N.J. Super. 333, 413 A.2d 990 (1980)	25
Stone v. Powell, 428 U.S. 465 (1976)	8
Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975)	16, 21
Terry v. Ohio, 392 U.S. 1 (1968)	10, 11
Torres v. Puerto Rico, 442 U.S. 465, 471 (1979)	11
Townsend v. Sain, 372 U.S. 293 (1963)	14
United States v. Adams, 581 F.2d 183 (9th Cir. 1978)	25
United States v. Awkard, 597 F.2d 667 (9th Cir. 1979)	25
United States v. Dichiarinte, 445 F.2d 126 (7th Cir. 1971)	13
United States v. Jones, 597 F.2d 485 (5th Cir. 1979)	11
United States v. Mendenhall, 446 U.S. 544, 557 (1980)	15
United States v. Presler, 610 F.2d 1206 (4th Cir. 1979)	11
United States v. Taibe, 446 F.Supp. 1142 (E.D.N.Y.), aff'd, 591 F.2d 1133 (2nd Cir. 1978)	
Vitek v. Jones, 445 U.S. 480 (1980)	19
Walter v. United States, 447 U.S. 649 (1980)	12, 13
Washington v. Texas, 388 U.S. 14 (1967)	24, 25
Williams v. State, 386 So. 2d 538 (Fla. 1980)	
Williams v. United States, 401 U.S. 646 (1971)	11
Witherspoon v. Illinois, 391 U.S. 510, 518 (1968)	18, 20
Zeigler v. State, 402 So. 2d 365 (Fla. 1981)	1, 8, 24

MISCELLANEOUS

A.L.I. Model Code of Pre-Arraignment Procedure (Proposed Official Draft, 1975)	13
A.L.I. Madel Penal Code and Commentaries § 210.6 (1980)	18
W. LaFave, Search and Seizure, A Treatise on the Fourth Amendment (1981)	13

QUESTIONS PRESENTED

1. Whether this Court's rejection of a crime scene exception to the warrant requirement, Mincey v. Arizona, 437 U.S. 385 (1978), applies to an exhaustive twelve-day warrantless search of the murder scene at defendant's store, or can that holding be evaded because the defendant had a gunshot wound and called the police to the store for help.

2. Whether police abuse Fourth Amendment notions of voluntariness by seeking consent from a sole suspect who is hospitalized, drugged, and reasonably certain to have diminished capacity or weakened will.

3. Whether it impermissibly erodes the essential role of a jury in violation of Due Process when a state involves the jury in a highly structured capital sentencing process based on factual determinations beyond a reasonable doubt, but then gives the judge discretion to overrule the jury's conclusion of life imprisonment to impose the death penalty.

4. Whether Double Jeopardy and Due Process protections are violated when the jury in a capital sentencing proceeding applies the statutory calculus of weighing mitigating circumstances against aggravating circumstances found beyond a reasonable doubt, concludes that a death sentence is not appropriate, but is then overruled by a judge who imposes a death sentence based on the same statutory criteria and the same evidence.

5. Whether, in a capital case, fair trial guarantees allow a state to exclude flatly all truth serum evidence, and related expert testimony, rather than have the trial judge inquire as to particular indicia of reliability, balancing the risk of prejudice against the relevance of crucial exculpatory evidence.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida, Zeigler v. State, 402 So. 2d 365 (Fla. 1981), is set out in Appendix A, infra.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on June 11, 1981. A timely motion for rehearing was denied on September 18, 1981, and this petition for certiorari was filed within ninety (90) days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), petitioners having asserted below and asserting here deprivations of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the capital sentencing provision of the statutes of Florida, Fla. Stat. Ann. § 4921.141 (West Supp. 1980), which is set out in Appendix B.

STATEMENT OF THE CASE

A. Background and Proceedings

On December 24, 1975, four people were killed at a furniture store owned and operated by the Petitioner, William Thomas Zeigler, Jr., in Winter Garden, Florida. The Petitioner's wife and her parents were shot to death. Charles Mays, Jr. was shot and then beaten to death. In addition, Mr. Zeigler was shot in the abdomen and seriously wounded. The prosecution contended that this injury was self-inflicted. On December 29, Zeigler was arrested in his hospital room at West Orange Memorial Hospital. He was indicted on March 26, 1976, by the Orange County Grand Jury and charged with four counts of first degree murder.

Zeigler's motion to suppress certain evidence obtained in the warrantless searches of his home and furniture store was denied by the trial judge (R.IV, 7-11)[1] after a hearing held on May 20, 1976. (VII 1-145) The trial began on June 10, 1976 and on July 2, the jury returned four verdicts of guilty--two for first degree murder and two for second degree murder. At the sentencing hearing held July 16, Petitioner presented testimony to the jury in mitigation of the sentence; the State presented no testimony. Argument was presented by both sides and the jury returned, after approximately a half an hour, with a recommendation of life imprisonment. (Tr. 2823-2824) At a sentencing procedure in the afternoon of July 16 the trial judge, without the aid of a presentencing report or other additional evidence, overturned the jury recommendation of life imprisonment and sentenced Mr. Zeigler to death for each of the first degree murder verdicts, and life imprisonment for each of the second degree murder verdicts. (Tr. 2863-2868) The Petitioner has appealed unsuccessfully to the Supreme Court of the State of Florida for relief on both search and seizure and sentencing grounds. 402 So. 2d 365 (1981)

B. The Search Of Zeigler's Furniture Store.

At approximately 9:17 on the night of December 24, 1975, shortly after the shooting at the furniture store subsided, Thomas Zeigler made an urgent telephone call to the house of Ted Van Deventer, a close personal friend.

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[1]The record that was before the Florida Supreme Court consisted of 32 volumes. In referring to this record, Volumes XVI-XXX containing the trial proceedings, which are consecutively paginated, will be cited as (Tr. page). Volumes containing certified copies of trial court documents will be referred to by (R.volume, page). Volumes containing pretrial and posttrial hearings will be referred to by a citation to the volume, e.g. (IV, page).

Zeigler informed Mr. Van Deventer that he had been shot and demanded to speak with Don Ficke, another of Zeigler's personal friends. Mr. Ficke, the police chief of the City of Winter Garden, Florida, was attending a party at the Van Deventer home.

Zeigler's conversation with Ficke was extremely brief. Ficke recounted the entire conversation at the suppression hearing (VII, 74):

> "He told me that he had been shot. I said, what happened. He Said please come help me, hurry."

Officer Thompson was the first to arrive at the furniture store. He found Zeigler at the front door, shot in the abdomen and bleeding badly. Zeigler collapsed into Thompson's arms and Thompson rushed him to the hospital. The police then entered the store, found four bodies, searched the area to see if the killer was still on the premises, and secured the building. (Tr. 380-94)

At 10:30 p.m., Donald Frye, a detective with the Orange County Sheriff's Department, arrived at the furniture store to direct the investigation. Frye later testified at oral deposition that upon commencing the investigation, he: "knew we were going to be there a long period of time". (Deposition of Donald Frye, April 23, 1976, p. 69) Despite this fact, no effort was made to obtain a search warrant on the night of December 24.

Indeed, absolutely no effort was made to obtain judicial approval for the seizure and repeated searches of Zeigler's store until January 6, 1976. On that date the Sheriff's Office filed a "Motion For Retention Of The Crime Scene", to ensure that the State's blood stain expert could conduct some tests without interruption. (R.I., 9)Detective Frye later explained his failure to seek a warrant during this twelve day period by stating that the store was a "crime scene", and that the police have an unrestricted right of access to such an area. (Deposition of Donald Frye, April 23, 1976 at 135-38)

Space prohibits a complete cataloguing of the evidence seized by the State from Zeigler's store. Literally hundreds of pieces of evidence were introduced at trial by the State, many of which were the direct fruits of the warrantless searches at Zeigler's store. The record reflects the intrusive nature of the store searches.

On December 26, more than 30 hours after any exigency at the store had passed, the police "started going through the paperwork" in Zeigler's personal office. Id. at 132. This expedition entailed not only a warrantless entry into the office, which was separated from the area in which the victims were found by two doorways, but also the breaking of two locks: one on a desk and the other on a credenza. The police went through Zeigler's personal papers, check books, and corporate records. Although most of these private materials were totally unrelated to the investigation, the police read through them and made written records of such facts as Zeigler's outstanding property tax liability; they seized several documents. Id. at 132-34.

In searching through the drawers of a second desk in Zeigler's office on December 26, Detective Frye discovered an opaque blue vinyl folder. Frye opened the folder and found several insurance policies, one of which Zeigler had taken out on the life of his wife. This policy, along with a second policy that was seized from the same drawer on December 27, became the basis for the State's allegation that Zeigler had a pecuniary motive to kill his wife. This evidence was introduced at trial over the defendant's timely objections. (Tr. 1793) It was key to both the determination of guilt and the consideration of aggravating circumstances in the sentencing.

On January 2, 1976, fully eight days after the State had secured the store, police officers returned to the store to search for further evidence. On this date, officers entered a back room separated from the area in which the

victims had been found by two metal doors, and searched the inside of a closed storage cabinet. The officers seized from this cabinet a grocery bag full of damaging evidence, which was introduced at trial over defense objections. (Tr. 1779)

C. The Search of Zeigler's Home.[2]

At 7:35 on the morning of December 25, 1975, Detective Frye and Chief Ficke went to West Orange Memorial Hospital to seek Mr. Zeigler's consent to a search of Zeigler's home. (VIII, 6-7) Another officer had conducted a search of the house the night before to ensure that no one there was in need of help. In addition, the police had been contacted earlier in the morning by both Edward Williams and Felton Thomas, the two witnesses whose testimony ultimately led to Zeigler's arrest; Zeigler was, at this time, the sole suspect in the police investigation. (Deposition of Donald Frye, April 23, 1976 at 112)

In short, the police sought Zeigler's consent in order to gain unrestricted access to Zeigler's home to search for evidence to be used against him.

At the hospital, the officers asked to see Zeigler, but were refused admission to Zeigler's room because of his physical and emotional condition. Zeigler had come out of surgery only six hours before and was still under the influence of anesthesia. He was receiving pain killers and medication intravenously and had been given one-eighth grain of morphine an hour and a half earlier. (VII, 66-67)

The officers decided to draft a written consent form and asked two nurses, Thompson and Clark, to obtain Zeigler's signature on the form. The consent read:

> "I, Thomas Zeigler do knowingly and willingly give Donald Ficke and Detective Frye permission to search my house in

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[2] A more complete version of the evidence presented on this issue can be found in the transcript of the suppression hearing, set out in Volumes VII and VIII; the order denying the motion to suppress is at (R.IV, 7-11).

an attempt to aid their investigation into the shooting that took place at 1010 Dillard Street in Winter Garden, Florida, on December 24, 1975." (VII, 141)

In sending the two nurses into Zeigler's room, the officers did not instruct the nurses to inform Zeigler of his constitutional right to refuse consent, or of the fact that Zeigler was the prime suspect in the police investigation; no such information was in fact given to Zeigler. (VII, 26)

When the nurses entered the room Zeigler was asleep. They awoke Zeigler and Nurse Clark informed him that the police wanted to search his home. Because Zeigler was without his glasses and could not read the consent form himself, Nurse Clark read the police statement to him. (VII, 70) At the suppression hearing, there was a great deal of testimony by Nurses Thompson and Clark as to exactly what was said during their visit to the room. However, the final series of questions put to Nurse Clark, who was admittedly the only one to speak to Zeigler during this session, is enlightening (VII, 72):

Q. Kathy, do you recall specifically saying anything other than they [the police] would like you to sign it? Do you recall specifically saying anything other than that?
A. I can't tell you for sure. I know I didn't demand he sign it.
Q. I understand you didn't demand he sign it. But, do you recall specifically anything other than they would like you to sign it?
A. No.
Q. Thank you.

At the suppression hearing, Zeigler testified that he had no recollection of the exchange with the nurses or the signing of any consent. In addition, samples of Zeigler's signature entered into evidence demonstrated that the signature obtained on the form differed significantly from Zeigler's normal signature. (VII, 78-80)

Detective Frye and Chief Ficke, after acquiring Zeigler's signature, proceeded immediately to Zeigler's home where they undertook an extensive and intrusive search of the premises, seizing several items--including towels from the bathrooms and from inside a washing machine, ammunition, vinyl strips cut from a car in the garage, the car itself, a

note written on a piece of legal-sized paper, and several blood samples. (VII, 6-7) Much of this evidence was introduced at trial over timely defense objections.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

In the trial court, petitioner fully raised the issues of search and seizure, the admissibility of truth serum evidence, and post trial relief related to sentencing, among other matters. Appellants Brief Before the Florida Supreme Court at 5, 8. Petitioner again raised these claims and the constitutionality of the statute before the state supreme court. Id. at 24-49, 71-72, 92-96.

REASONS FOR GRANTING THE WRIT

I. PETITIONER'S CONVICTION AND SENTENCE OF DEATH WERE BASED IN PART ON EVIDENCE OBTAINED IN VIOLATION OF HIS FOURTH AND FOURTEENTH AMENDMENT RIGHTS.

The Petitioner has two Fourth Amendment arguments: (A) the Florida Supreme Court has offered a transparent post hoc rationale to escape the clear applicability of Mincey v. Arizona, 437 U.S. 385 (1978); and (B) the Florida courts have ignored familiar doctrines concerning voluntariness in finding that consent was given from a post-operative hospital bed, establishing a precedent that invites official abuse in implicitly coercive settings. Notwithstanding the sentence of death, these claims cannot be raised later in a collateral action in federal court. Stone v. Powell, 428 U.S. 465 (1976).

A. The Florida Supreme Court Has Evaded The Clear Holding Of Mincey v. Arizona, 437 U.S. 385 (1978) By Approving A Twelve-Day Warrantless "Crime Scenes" Search Of Petitioner's Store And Personal Papers.

The police investigating this case believed that the warrant requirement was simply not applicable to their actions. The Chief investigator, Detective Frye, testified in oral deposition that although he did not have consent from Mr. Zeigler, the twelve days of repeated warrantless

searches and seizures of Zeigler's store, office, and personal papers were not subject to the warrant requirement because "They were inside the crime scene and we have a right to the crime scene."[3] When asked at the suppression hearing why no effort was made to obtain a warrant prior to searching through Zeigler's personal papers, Detective Frye responded: "I was looking for fruit of the crime involved in a crime scene." (VII, 24)

The trial judge, in ruling that the warrantless actions of the police were lawful, also relied heavily upon the "crime scene" rationale:

> "The evidence is unequivocal that the defendant himself called the police to the store; that there were four dead bodies at the store; that the police were in process of conducting a crime scene investigation which, due to its complexity, continued for more than a week; that the police were legally upon the premises carrying out their required duties. There is nothing illegal or unlawful in so investigating the scene which would require the items taken be suppressed." (IV, p.11)

While this order makes reference to the fact that Zeigler called Chief Ficke for help, the clear thrust of the judge's reasoning is that the police conduct was made lawful by the fact that the police were conducting a crime scene investigation. The order expressly declares that the scope and

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[3]Detective Frye was very forthcoming during sworn testimony given at an oral deposition on April 23, 1976 (at pp. 135-138):

Q. While conducting this check of Mr. Zeigler's personal papers, had you obtained his consent to do that?
A. No, I did not.
Q. Did you have a properly authorized search warrant to search his personal items or anything like that?
A. They were inside the crime scene and we have a right to the crime scene.

. . . .

Q. By what authority did you search the desk and area where you found the Food World bag?
A. Because it was part of that store, interior of the store.
Q. You felt your crime scene authority covered the four walls, everything on the inside?
A. Yes.
Q. You obtained no search warrant?
A. No.
Q. Nor did you have a consent from Tommy Zeigler, the defendant in this case?
A. That's Correct.

duration of the investigation were properly determined by the complexity of the investigation and the duties of the police.

This reasoning is in direct conflict with the holding of this Court in Mincey v. Arizona, 437 U.S. 385 (1978). In Mincey, this Court struck down the narrower Arizona "murder scene exception" to the Fourth and Fourteenth Amendments, holding that a four day warrantless search of the defendant's apartment could not be constitutionally permissible simply because a homicide had recently occurred there and investigation was under way. Mincey did not announce a new constitutional rule, but rather reaffirmed several well recognized principles: (1) "[I]t is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment--subject only to a few specifically established and well delineated exceptions,'"; (2) "[A] warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation,'"; and (3) "[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment". Mincey v. Arizona, supra, 437 U.S. at 390, 393 (quoting, respectively, Katz v. United States, 389 U.S. 347, 357 (1967); Terry v. Ohio, 392 U.S. 1, 25-26 (1968); Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971)).

If the Arizona "murder scene exception" is not a valid justification for a warrantless search, then the broader Florida "crime scene" justification must surely fail. No less than in Mincey, the propriety of the initial police entry at the scene cannot justify the length and extensiveness of the unauthorized intrusion. There was no continuing exigency. The trial judge's expansion of the State's authority to conduct warrantless searches had no basis in any established Fourth Amendment principles and was wholly contrary to the mandates of this Court's decision in Mincey; as well as to

those in Katz, Terry, and Coolidge.

The Florida Supreme Court sought to distinguish Mincey, which had been decided after the trial,[4] by declaring that:

> "In the case sub judice, the police were at the store as a result of the invitation of the defendant. That invitation removed any application of Mincey."

402 So. 2d at 372. Since there has never been an "invitation" exception to the warrant requirement, it must be assumed that the Florida Court was attempting to bring this search within the well-delineated consent exception. But this appears to be a post hoc rationalization, and it suffers from two independently fatal flaws. First, Mr. Zeigler's cry for help while suffering from a serious bullet wound cannot be construed as a consent to search under the voluntariness standards set forth by this Court in Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Second, even if some form of "invitation" can be found, the use of this consent to authorize a twelve-day intrusion into Zeigler's desk drawers, cabinets, and personal papers is contrary to opinions

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[4]The State of Florida, in its argument before the Florida Supreme Court, contended that Mincey should not be applied "retroactively" to the search of Zeigler's store. This argument, which was based on this Court's decision in Williams v. United States, 401 U.S. 646 (1971), was not dealt with by the Florida court. However, it is worth noting that Williams seems particularly inapplicable to the Mincey decision, since Williams restricts the retroactive application of certain types of "new constitutional standards". Mincey did not impose new burdens on law enforcement officials, but merely reaffirmed the existing Fourth Amendment guarantee of protection from unreasonable searches; a protection well recognized and in full force at the time of the search of Zeigler's store.

This Court has cited Mincey's general principles when invalidating several "pre-Mincey" searches, but without expressly considering its retroactive applicability. Arkansas v. Sander, 442 U.S. 753, 758 (1979); Torres v. Puerto Rico, 442 U.S. 465, 471 (1979). While one Court of Appeals has refused, without elaborating, to apply Mincey retroactively, that decision is distinguishable because there the officers discovered the evidence in question "[d]uring their search for suspects or injured persons." United States v. Jones, 597 F.2d 485, 489 (5th Cir. 1979). Arguably, Mincey was not even applicable to those facts because of the apparent exigent circumstances. The Fourth Circuit has applied Mincey retroactively, without discussion. United States v. Presler, 610 F.2d 1206, 1210-11 (4th Cir. 1979).

of this Court on the necessary limits to the scope, purpose and duration of authorized searches, as reviewed in Walter v. United States, 447 U.S. 649 (1980).[5]

In Schneckloth, this Court held that "'[w]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given.'" Schneckloth v. Bustamonte, supra, at 222, 248-249. (quoting Bumper v. North Carolina, 391 U.S. 543, 548 (1968) Voluntariness is to be determined from all the surrounding circumstances. Id. The State of Florida contends that a call for medical assistance--made to the home of a personal friend by a man bleeding badly from an abdominal gunshot wound--is, in fact, a "freely and voluntarily" given consent for the police to search his property for twelve days. The Florida Supreme Court's holding results in an automatic forfeiture of Fourth Amendment protection for any person who calls for the aid of the police; it literally forces a seriously injured person to choose between life and liberty. As a matter of law, this was not consent.

Even if some form of consent can be constructed from Zeigler's cry for help, the question remains whether this consent authorized a twelve-day seizure of the entire store with repeated intrusions into Zeigler's desk drawers, cabinets, and personal papers. The holding of the Florida Supreme Court stands for the proposition that any consent, even one

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[5]The contention that Zeigler shot himself and called the police as part of a scheme is irrelevant to ascertaining the existence or scope of consent. The burden of proving voluntariness rests on the prosecution, Schneckloth, supra, at 222, and must be carried prior to introduction of the evidence. "[A] conviction cannot be used ex post facto to validate the introduction of evidence used to secure the same conviction." Michigan v. Tyler, 436 U.S. 499, 506 (1978). Since no mention was made at the suppression hearing of such an alleged scheme, the Judge could not have assumed there was one.

consisting of no more than "please come, help me, hurry", is sufficient to authorize the most intrusive and extended of searches. This is in direct conflict with the clear language in Walter v. United States, 447 U.S. 649 (1980). In that case, Justice Stevens, announcing the judgment of the Court, declared:

> "When an official search is properly authorized--whether by consent or by the issuance of a valid warrant--the scope of the search is limited by the terms of its authorization. Consent to search a garage would not implicitly authorize a search of an adjoining house; a warrant to search for a stolen refrigerator would not authorize the opening of desk drawers. Because 'indiscriminate searches and seizures conducted under the authority of general warrants were the immediate evils that motivated the framing and adoption of the Fourth Amendment,' Payton v. New York, 445 U.S. 573, 583 [(1980)], that Amendment requires that the scope of every authorized search be particularly described." (Walter v. United States, supra at 656-7 (footnotes omitted; emphasis added)

It has been well established in the lower federal courts, state courts and commentaries, that the scope of consent searches must not exceed the express or implicit limits of the consent given--whether in duration, physical extent, intensity or purpose.[6] This principle was ignored by the Florida courts. The search of Zeigler's store certainly exceeded the scope of any consent that can possibly be inferred from a cry for help.[7]

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[6]See, e.g., the following and cases cited therein: United States v. Dichiarinte, 445 F.2d 426 (7th Cir. 1977) (leading case); People v. Torand, 622 P.2d 562 (Colo. 1981); Love v. State, 242 S.E.2d 278 (Ga. App. 1978) ("We know of no case which has allowed police officers arbitrarily to expand the scope of a consent search"); W. LaFave, Search and Seizure, A Treatise on the Fourth Amendment §8.1, at 612, 624-635 (1978); A.L.I. Model Code of Pre-Arraignment Procedure, § SS240.3 (Proposed Official Draft, 1975; subsequently adopted).

[7]To include all of the searches at issue here within the scope of a valid consent would not only require a finding that Zeigler authorized the police to control the entire store for the twelve day period, but also a ruling that the warrantless opening of opaque folders and containers was proper. Such a conclusion is contrary to this Court's recent holding in Robbins v. California, 101 S. Ct. 2841 (1981) (automobile exception does not defeat expectation of privacy, and hence warrant requirement, for packages wrapped in opaque plastic, found in luggage compartment).

The Fourth Amendment was intended by the Framers to cover the very kind of situation at issue here: officials using their own standards of expediency to conduct an intrusive search of private premises--breaking locks, prying open cabinets, rummaging through papers--without a warrant and outside any recognized exception to the warrant requirement. While the Florida courts have attempted to cure that illegality and escape Mincey by inferring consent, that attempt is patently strained in view of Zeigler's gun shot injury, the excessive scope of the search, and the admission by police that they assumed they neither had nor needed consent. The Petitioner, sentenced to die and without resort to collateral action on these issues, prays the Court issue a writ and enforce the holding of Mincey.

B. The Courts Below Misapplied The Voluntariness Principles Of Schneckloth v. Bustamonte, 412 U.S. 218 (1973), And Townsend v. Sain, 372 U.S. 293, 307-309 (1963), By Holding That Petitioner Gave Valid Written Consent To A Search Of His House From His Hospital Bed, Six Hours After Surgery, Shortly After Administration Of Morphine, Without His Eyeglasses, And Where, Unbeknownst To Petitioner, Police Were Investigating Him As Their Sole Suspect.

Consent must be voluntary and the product of a free intellect. See Schneckloth, supra, and cases cited therein. Absent overt coercion, it is difficult to imagine circumstances more violative of the voluntariness requirement than the circumstances of Tommy Zeigler's hospital bed "consent", as detailed in the presentation of facts, supra p. 6. Situations such as this invite abuse. Officials will almost inevitably put various forms of subtle pressure on the incapacitated sole suspect under medical attention, exploiting diminished capacity and weakened will. In Townsend v. Sain, 372 U.S. 293 (1963), the confession of a similarly disadvantaged suspect failed the voluntariness test. Since the Court has looked to pre-Miranda cases for guidance on consensual searches[8], the voluntariness of Mr. Zeigler's

[8] Schneckloth looked to pre-Miranda cases on involuntary confessions for guidance on consensual searches. Supra, 412 U.S. at 223-224. See, e.g., Townsend v. Sain, 372 U.S. 293 (1963); Culombe v. Connecticut, 367 U.S. 568 (1961).

consent, like the voluntariness of an analogous confession, must deemed suspect as a matter of law.

This is necessarily so. A determination of voluntariness must be based on the particular "mental state" of the consenting party. Culombe v. Connecticut, 367 U.S. 568, 603 (1961). Thus the inquiry is a subjective one, even though a reviewing court must infer mental state from objective circumstances. That process of inferring and assessing volition at a suppression hearing will be exceptionally difficult when, as here, medication and circumstances make it clear that the consenting party's mental state is far out of the ordinary. Without the requisite confidence in an inference of voluntariness, there can be no fair finding of concent.

In situations like that of Mr. Zeigler, with no suggestion of exigency, the police should not be permitted to avoid the Fourth Amendment's requirements of probable cause and particularity by seeking a consent that cannot be "in fact, voluntary."[9]

II. IN ALLOWING THE TRIAL JUDGE TO OVERRULE A JURY RECOMMENDATION OF LIFE IMPRISONMENT AND IMPOSE DEATH, WITHOUT ANY ADDITIONAL EVIDENCE, FLORIDA VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Although the Constitution does not require that states involve the jury in sentencing, Florida has chosen to do so. The sentencing statute provides for a jury determination, labeled "advisory", arrived at by finding and weighing mitigating and aggravating factors. The Florida Supreme Court has consistently held that the jury must not recommend death if it finds that mitigating circumstances outweigh aggravating, with each aggravating circumstance proven beyond a reasonable doubt. The trial judge, using the same calculus,

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[9]Quoting United States v. Mendenhall, 446 U.S. 544, 557 (1980).

and notwithstanding the findings of the jury, can overturn the jury's recommendation in either direction. There is an automatic right of appellate review. On appeal, "[I]n order to sustain a sentence of death following a [jury] recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d. 908, 910 (Fla. 1975) (quoted in Proffitt v. Florida, 428 U.S. 242, 249 (1976).

The scheme has two important flaws. First, the Tedder standard for overriding the jury on life is flatly incomprehensible, since a majority of presumably reasonable jurors applied the criminal proof standard and in fact disagree with the judge. It may be that the judge is supposed to apply a different evidentiary test, consider some unidentified and more restrictive set of mitigating circumstances, or balance mitigation and aggravation differently. We simply cannot tell what the law intends, and neither can a sentencing judge. Second, the judge seems to have a mandate to apply this elusive standard in any or all cases, since nothing in statute or case law suggests limiting the occasions for exercising this discretion by triggering it with, for example, some possibility of juror prejudice or the use of a presentencing report available to the judge but not the jury.[10] In sum, the statute and Tedder give no useful guidance on when and how judges are to exercise their discretion, and erode the reliability of the fact-based sentence determination. This unstructured, unreliable discretion violates the requirements of Furman v. Georgia, 408 U.S. 238 (1972), and Beck v. Alabama, 447 U.S. 625, 638-43 (1980).

Finally, in practice this procedure for displacing jury recommendations of life has spawned a series of inconsistent and

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[10] In Gardner v. Florida, 430 U.S. 349 (1977), the judge relied on a confidential presentencing report to override the jury and impose death. The plurality held that the defense was entitled to see and challenge that report, and that the report must be available to facilitate appellate review. None of the opinions focused on the practice of overriding a jury recommendation.

seemingly ad hoc decisions by the Florida Supreme Court. The inherent ambiguity of the statutory aggravating and mitigating circumstances is made even more confusing when combined with a remarkably vague mandate for judges to overturn votes for mercy. Like cases are not treated alike.

A. Having Chosen To Involve The Jury In Capital Sentencing, Florida's Use Of Judicial Discretion To Displace Jury Findings Of Fact Violated The Defendant's Due Process Rights.

The Constitution requires that sentencing discretion be "guided and channeled by a system that focuses on the circumstances of each homicide and individual defendant in deciding whether the death penalty is to be imposed." Proffitt v. Florida, 428 U.S. 242, 258 (1976). The Florida statute survived that constitutional test by prescribing a calculus of balancing enumerated aggravating and mitigating circumstances. But the state has gone further. Florida has given defendants in capital crimes a statutory right to have the jury centrally involved in the sentencing process. In particular, the State has made the jury more than a sample of public opinion on the defendant's fitness to live; the jury is charged first to make determinations of fact and, second, to compare the weight of its conclusions as to aggravating and mitigating factors.

The defendant therefore has two related liberty interests: death will not be imposed without (a) a jury role and (b) satisfaction of the sentencing criteria. Yet the State seeks to limit or condition the rights it has given by making the jury role mere surplusage--"advice" to be turned aside in the discretion of the trial judge. In the context of the competing interests of State and defendant, including the defendant's interest in jury involvement, in fair application of the sentencing calculus, and in life itself, the State's conditions violate the Due Process clause of the Fourteenth Amendment.

A survey of death penalty statutes in other states

reveals the great importance attached to jury recommendations in capital sentencing proceedings.[11] Twenty-seven of a total of thirty-six states with death penalty statutes accord finality to a jury recommendation of life imprisonment. Twenty of those twenty-seven states require a life sentence unless the jury unanimously agrees on death. In only two states, Florida and Indiana, is a jury sentence of life not statutorily binding. Five states provide for the penalty determination by a judge alone. Thus the great majority of states that enacted death penalty statutes have recognized not only the value of jury input in sentencing proceedings, but also the need for constitutional safeguards against arbitrary sentencing where the jury finds that the evidence does not support a sentence of death.[12]

Admitting, arguendo, that the Fourteenth Amendment does not compel states to provide capital defendants this benefit of a jury role,[13] Florida has nonetheless chosen to cloak its death sentencing process with the values, protections, and legitimacy traditionally associated with juries.[14] This seems particularly appropriate in view of the fact-finding and balancing functions seemingly contemplated here--functions clearly rooted in the jury's traditional roles in the guilt phase and as an organ of community values and sensibilities. See Witherspoon v. Illinois, 391 U.S. 510, 518 (1968). The jury has also served as a popular check on abuses by prosecutors and judges. Yet all of these essential aspects of our notion of a jury are destroyed when, in situations like that

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[11]The results of this survey are presented in more detail in Appendix C.

[12]Commentators have noted the need to accord finality to a jury recommendation of life imprisonment. See, e.g., A.L.I., Model Penal Code and Commentaries § 210.6(2)(1980).

[13]Although "evolving notions" of constitutionally required fairness may in fact require such a jury role in sentences of death, a narrower question is presented here.

[14]The force of that choice is underscored by the statutory provision of a sentencing jury even when the defendant waives a jury trial or pleads guilty. See § 921.141(1) (set out in Appendix B.)

of Mr. Zeigler, a judge uses discretion to defeat the finality of the jury's conclusions. When a judge does this, not only does it strip away the substantive content of the promised right to a jury sentencing role; it also constitutes a procedure that must fail a due process test for protecting the defendant's liberty interest in not being put to death without a fair and accurate application of the sentencing calculus and standard of proof.

Even if the defendant's underlying specific interests in the jury and the calculus are grants by the State rather than rights under the Constitution, this Court has held directly that a state law cannot create an interest but then, by statute or otherwise, attach procedures or conditions that fail the balancing analysis of due process scrutiny. Vitek v. Jones, 445 U.S. 480, 488-91 (1980). In Vitek, the Court held that a state law establishing criteria and procedures for inmate transfers from prison to a mental institution created a liberty interest in not being transferred without a fair and accurate process for establishing that the criteria are satisfied. A procedure based merely on a physician's authorization, although the clear and exclusive procedure contemplated in the statute, was held insufficient as a matter of due process because of the importance of the liberty interest. Id. In Arnett v. Kennedy, 416 U.S. 134 (1974), a majority of the Justices concluded that even a mere interest in continued public employment cannot be conditioned or qualified in any manner the legislature chooses.[15] Mr. Zeigler's interests, in fair application of the sentencing calculus and in the involvement of a jury

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[15]The plurality in Arnett concluded that the very limited termination procedure was inseparably linked to the actual interest in continued employment granted in the statute, and therefore could not be challenged on procedural due process grounds. 416 U.S. at 152, 155 (Rehnquist, J., joined by Burger, C.J. and Stewart, J.). This view was rejected by the other Justices, id., at 164-67, 185-86, 210-11.

that is more than a jury in name only, are even weightier than those in these earlier cases.

It is no more acceptable for a state to invite the jury to participate in sentencing and then displace its traditional function with respect to facts, than it is for the state to involve the jury in sentencing but fail to ensure that the jurors are impartial. See Witherspoon v. Illinois, supra.[16] Either practice belies the essential constitutional notion of a jury. As another analogy, consider a state statute that provides for a jury trial in a class of criminal cases for which the Constitution does not require a jury. See Duncan v. Louisiana, 391 U.S. 145, 159 (1968). It now seems unthinkable that in such a case the Fourteenth Amendment would countenance a standard of proof less than "beyond a reasonable doubt," In re Winship, 397 U.S. 358 (1970), or that the judge could overrule the jury's findings of fact on elements of the crime. The State should be bound by the natural and historical implications of invoking a jury in a capital sentencing context no less than it is bound when, for example, the State chooses to include a particular fact as an element distinguishing related offenses rather than as a mere factor in sentencing discretion, and thereby triggers the constitutional requirements of proof by the prosecution beyond a reasonable doubt. Mullaney v. Wilbur, 421 U.S. 684 (1975).

Finally, this procedure is particularly objectionable as applied to Tommy Zeigler. The jury concluded that those aggravating circumstances it could find beyond a reasonable doubt, if any, were outweighed by mitigating factors. The judge was charged by the state's high court to overrule the jury only based on facts "so clear and convincing that

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[16] In Witherspoon the Court who pointed out that the constitutional requirement of sentencing impartiality would apply even if a jury recommendation of death could be overruled by the judge. 391 U.S. at 518 n.12.

virtually no reasonable person could differ." Tedder v. State, supra. Yet the judge imposed death, without any facts before him other than those available to the jury. In this case there was, for example, no special presentencing report which might have given the judge other information and thereby explain why he, unlike a majority of the jurors, was without doubt.

Florida allows a judge to exercise virtually unguided discretion in displacing the jury in its essential functions, and thereby introduces a substitute procedure which impermissibly erodes the reliability of the sentencing calculus. The legitimacy, fairness and accuracy Florida promises by statute, are removed by a dose of discretion, anomalously applied by the trial judge in this case. This truncation of jury rights, in a context where the defendant's interests are the greatest imaginable, is not due process.[17]

B. The Jury's Conclusion As To Sentence, Being Based On A Statutorily-Prescribed Process of Fact-Finding, Triggers Double Jeopardy Protections Which Were Violated In This Case When The Judge Effectively Retried The Defendant and Overruled the Jury To Impose Death. Bullington v. Missouri, 101 S. Ct. 1852 (1981).

The Florida statute and case law give the jury in capital sentencing a role quite analogous to that constitu-

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[17]The death sentence is an option only for first degree murder. Because the judge can overrule the jury and impose death, there is a substantial risk that jurors will give the defendant less than full benefit of "beyond a reasonable doubt" on a first degree charge, mistakenly believing that they can choose to punish as though it were only a conviction for second degree. The confusing separation of functions and compounding of discretion creates this unreliability, in violation of Beck v. Alabana, 447 U.S. 625, 638-43 (1950).

Indeed, we cannot disregard the possibility of a compromise verdict here. In the guilt phase, the jury split the counts evenly between first and second degree murder. The petitioner has been unsuccessful in pressing his claims of improper juror conduct. Appellants Brief before the Florida Supreme Court at 7-9, 75-84. It remains a possibility, however, that unpersuaded jurors acquiesced in the convictions on first degree, with the common sense expectation that the jury would be able to impose a life sentence, rather than death.

tionally required in the guilt phase. The jury is charged in detail as to the factual predicates of aggravating circumstances as outlined in the statute, and told to disregard circumstances not proven beyond a reasonable doubt. These must then, by statute, be weighed against what they find in mitigation. Even though the statute and jury instructions are clear in characterizing the jury's ultimate conclusion on the sentence as advisory, in all other respects the jury process is the familiar one, indistinguishable from situations in which the jury decision is binding. Under these procedures, where the jury concluded that the facts proven did not justify a death sentence, setting aside that conclusion as merely advisory violated the Double Jeopardy Clause and the Fourteenth Amendment.

In Bullington v. Missouri, 101 S. Ct. 1852 (1981), this Court held that "[b]ecause the sentencing proceeding at the petitioner's first trial was like the trial on the question of guilt or innocence, the protection afforded by the Double Jeopardy Clause to one acquitted by a jury is also available to him, with respect to the death penalty at his retrial." 101 S. Ct. at 1862.

The Bullington decision turned upon the similarities between the trial and sentencing procedures, including: (1) the existence of a separate, trial-like sentencing proceeding: (2) substantive statutory standards (balancing aggravating and mitigating circumstances) guiding the jury's discretion in choosing a sentence; (3) sharply limited sentencing options--life imprisonment or death--rather that a broad range; (4) a statutorily defined difference in factual predicates for the different sentences; and (5) a requirement that the state prove the existence of aggravating circumstances beyond a reasonable doubt. Florida's capital-sentencing proceeding includes every one of these Bullington conditions.

As the Court emphasized in Bullington, the structure of this sentencing procedure in effect asks the jury whether

the prosecution "proved its case"; if the jury concludes that it has not, this is tantamount to an acquittal as to those facts required to justify execution. Id. at 1859-62.[18]

If the trial judge had sentenced Tommy Zeigler to death based on evidence available to him but not to the jury, as for example in a confidential presentencing report, then a very different case would arise. The issue would be whether a due process or fair trial theory can require that all of the evidence be considered by the sentencing jury. But when there is no additional fact or evidence for the judge to consider, and the defendant's interests are so weighty, the Double Jeopardy principles and policies reviewed in Bullington seem wholely apposite. The judge, for no apparent substantial state purpose, has retried the defendant[19] as to those facts necessary to justify a sentence of death.

III. EXCLUSION OF PETITIONER'S CRUCIAL EXCULPATORY TRUTH SERUM EVIDENCE, AND RELATED EXPERT TESTIMONY, VIOLATED HIS RIGHT TO A FAIR TRIAL BY DENYING HIM ADEQUATE OPPORTUNITY TO ESTABLISH HIS INNOCENCE.

The Florida Supreme Court applied a flat rule prohibiting the use of truth serum evidence, giving unreliability and

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[18] See also, Burks v. United States, 437 U.S. 1 (defendant may not be retried if reason for reversal of first trial was that evidence was insufficient to convict), and Green v. United States, 355 U.S. 184 (1957) (retrial on first degree murder not allowed after reversal of first trial conviction for the lesser included offense of second degree murder; first trial conviction was tantamount to acquittal on the more serious charge).

[19] The Florida Supreme Court rejected a double jeopardy challenge in Douglas v. State, 373 So. 2d. 895 (Fla. 1979), alleging that removing judicial discretion to overturn a jury recommendation of life imprisonment would be unconstitutional in light of the Supreme Court's decision in Furman v. Georgia, 408 U.S. 238 (1972). The Supreme Court's rejection of the capital sentencing procedures in Furman, however, was premised upon the arbitrary imposition of the death penalty, rather than the "arbitrary" granting of mercy. Procedural safeguards were necessary to prevent error on the side of imposing a sentence of death. Giving a jury recommendation of life imprisonment binding effect would not subject the Florida statute to constitutional attack under Furman. Gregg v. Georgia, 428 U.S. 153, 199 (1976) (Stewart, Powell, & Stevens, JJ.). It is clear that the state's interest in preventing the "arbitrary" granting of mercy is of a much lower order than its interest in avoiding arbitrary death sentences.

hearsay rationales. Zeigler v. State, 402 So.2d 365, 373 (1981). This approach, in a capital case where evidence was crucial to the defense, fails a test for due process and fair trial. At a minimum, a court must inquire to see whether there are specific indicia of reliability, and then expressly balance the relevance against the risk of prejudice. The defense sought to introduce the videotape of Mr. Zeigler's truth serum interview by a psychiatrist, who also would have given expert testimony on the sodium butathol procedure, its reliability, and his favorable assessment of Mr. Zeigler's responses. The judge ruled all of this inadmissible, (Tr. 2107) and was upheld on appeal. Neither court inquired into the safeguards which had been taken to make the test reliable; neither court considered whether some modest flexibility in flat evidentiary rules might be appropriate for this capital defendant, under all of the circumstances.

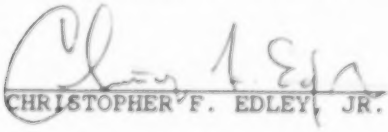
Precedents in this Court, not discussed in the opinion below, firmly establish that when vital liberty interests are at stake mechanistic rules of evidence must be tempered by a constitutional concern that the defendant be able to present crucial exculpatory evidence. In Green v. Georgia, 442 U.S. 95 (1979) (per curiam), a Georgia hearsay statute was held unconstitutional as applied to exclude exculpatory evidence in the capital sentencing proceeding, because the proffered testimony was "highly relevant" and "substantial reasons existed to assume its reliability." Id, at 97. In Chambers v. Mississippi, 410 U.S. 284 (1973), the Court also emphasized the presence of several indicia of reliability in holding that the State's hearsay and common law "voucher" rules must bend to allow the murder defendant to make the jury aware of another person's earlier confession to the crime. In Washington v. Texas, 388 U.S. 14 (1967), the compulsory process guarantee was first made applicable to the states in requiring flexibility in an otherwise rigid procedural statute which prohibited testimony for the defendant by a coparticipant.

This Court has rejected in capital cases the a priori exclusion of a category of exculpatory testimony, especially if such testimony might be available for other purposes. Washington v. Texas, supra, 388 U.S. at 22. Several jurisdictions, including Florida, admit hypnotically refreshed testimony, and supporting expert testimony if the opposition attempts impeachment. United States v. Awkard, 597 F.2d 667 (9th Cir. 1979); United States v. Adams, 581 F.2d 193 (9th Cir. 1978); State v. Hurd, 173 N.J. Super. 333, 413 A.2d 990 (1980); Clark v. State, 379 So. 2d 372 (Fla. App. 1979) While hypnosis is admitted for these purposes, Florida has applied a mechanistic rule to exclude direct truth serum evidence.[20] In a capital context, where the proferred evidence is arguably key to the defense, the Constitution requires at least that a judge examine the particular circumstances for indicia of threshold reliability. This modest procedural concession was not too much for Mr. Zeigler to ask in trying to establish his innocence.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Florida.

Respectfully submitted,



CHRISTOPHER F. EDLEY, JR.

ELIZABETH BARTHOLET

1525 Massachusetts Ave.
Cambridge MA 02138
(617) 495-3101

[20]The justification for so rigid a rule in this case is especially suspect because Mr. Zeigler's testimony at trial was based on recall aided by the truth serum. (Tr. 2095-98).

Appendix

APPENDIX A

William Thomas ZEIGLER, Jr., Appellant,

v.

STATE of Florida, Appellee.

No. 59355.

Supreme Court of Florida.

June 11, 1981.

Rehearing Denied Sept. 18, 1981.

Defendant was convicted in the Circuit Court, Duval County, Maurice M. Paul, J., of two counts of murder in the first degree and two counts of murder in the second degree, and he appealed. The Supreme Court, Adkins, J., held that: (1) evidence was sufficient to sustain verdicts, (2) error in consolidating cases for trial was not reversible where defendant's substantial rights were not prejudiced; (3) search of defendant's house was reasonable; (4) trial court did not commit reversible error in admitting expert evidence which had not been disclosed to defendant where trial court recessed trial to give defendant opportunity to examine witness and evidence; and (5) facts supporting sentence of death were clear, convincing, and established beyond reasonable doubt.

Affirmed.

Sundberg, C. J., and England, J., concurred in conviction but dissented as to sentence.

1. Homicide ⇐253(1), 254

Evidence was sufficient to sustain convictions of two counts of first-degree murder and two counts of second-degree murder.

2. Criminal Law ⇐620(1), 1166(1)

Error in consolidating for trial indictment charging defendant with three counts of first-degree murder for shooting deaths of three victims and second indictment charging defendant with first-degree murder for beating death of fourth victim over defendant's objection was not reversible error as defendant's substantial rights were not prejudiced in that time between consolidation and trial represented several months and offenses were related. 33 West's F.S.A. Rules of Criminal Procedure, Rule 3.151(b), West's F.S.A. § 924.33.

3. Criminal Law ⇐1151

Action of trial court on motion for continuance will not be disturbed on appeal unless there has been palpable abuse of discretion. 33 West's F.S.A. Rules of Criminal Procedure, Rule 3.151(b).

4. Criminal Law ⇐577.10(8)

If continuance is granted upon motion of defendant, speedy trial time is tolled. 33 West's F.S.A. Rules of Criminal Procedure, Rules 3.151(b), 3.191.

5. Criminal Law ⇐586

Decision to grant or deny motion for continuance is addressed to sound discretion of trial court.

6. Criminal Law ⇐586

In prosecution for first-degree murder, trial court did not abuse its discretion in denying defendant's motions for continuance where there were only 21 days within speedy trial time in which trial could have taken place had continuance been granted and defendant refused to waive right to speedy trial. 33 West's F.S.A. Rules of Criminal Procedure, Rules 3.151(b), 3.191.

7. Searches and Seizures ⇐7(1)

Reasonableness of entry by police upon private property is measured by totality of existing circumstances. U.S.C.A. Const. Amend. 4.

8. Criminal Law ⇐1224(2)

Right of police to enter and investigate an emergency, without accompanying intent either to seize or arrest, is inherent in nature of their duties as peace officers and derives from common law. U.S.C.A. Const. Amend. 4.

9. Searches and Seizures ⇐7(24)

Seizure of gun located on rear floor of automobile which was parked in garage was reasonable where officer knew that defend-

ant had been involved in shooting at store, proceeded to defendant's house to determine location of his wife and her parents, and, after finding no one in house, proceeded to garage and observed car. U.S.C.A. Const. Amend. 4.

10. **Searches and Seizures** ⇐7(28)

Record supported determination of trial court that defendant's consent to search of his house was voluntarily given.

11. **Searches and Seizures** ⇐3.3(4)

Police may seize any evidence that is in plain view during course of their legitimate emergency activities.

12. **Criminal Law** ⇐394.5(3)

Evidence seized as result of search of store where homicide victims were found was admissible where defendant had called police to store to investigate. U.S.C.A. Const. Amend. 4.

13. **Criminal Law** ⇐627.8(6)

Trial court has discretion in determining whether noncompliance with discovery rule results in harm or prejudice, but that discretion can be properly exercised only after court had made adequate inquiry into all surrounding circumstances. 33 West's F.S.A. Rules of Criminal Procedure, Rule 3.220.

14. **Criminal Law** ⇐627.8(6)

Failure to observe and comply with rule of discovery should be remedied in manner consistent with seriousness of breach. 33 West's F.S.A. Rules of Criminal Procedure, Rule 3.220.

15. **Criminal Law** ⇐1169.9

In prosecution for first-degree murder, trial court did not commit reversible error in admitting evidence of expert witness relative to tests made to compare defendant's shoes with bloody footprints at scene of crime, which tests had not been disclosed by State to defendant, where trial court recessed trial to give defendant opportunity to examine witness and his evidence. 33 West's F.S.A. Rules of Criminal Procedure, Rule 3.220.

16. **Criminal Law** ⇐566

Unless it is shown when fingerprint was placed on particular item or particular location, that fingerprint is insufficient circumstance on which to base guilt.

17. **Criminal Law** ⇐1169.1(5, 10)

In prosecution for first-degree murder, trial court did not commit reversible error in admitting fingerprint evidence and bullet taken from orange grove where defendant allegedly took victim and another to fire guns; purpose of introducing such evidence was to corroborate testimony of state's witnesses.

18. **Criminal Law** ⇐404(4)

Sufficient predicate showing chain of custody existed where evidence seized and sent to FBI was returned in substantially same basic condition, with exception of necessary alterations for testing and identification.

19. **Criminal Law** ⇐388

Results of sodium butathol test are not admissible in criminal prosecution.

20. **Criminal Law** ⇐354

During guilt phase of trial, testimony regarding mental state of defendant in criminal case is inadmissible in absence of plea of not guilty by reason of insanity.

21. **Criminal Law** ⇐419(1)

Utterances are exempt from hearsay rule, for example, utterances which accompany material, equivocal act, and serve to explain act and give it definite legal significance are exempt from hearsay rule.

22. **Criminal Law** ⇐419(3)

Witness' testimony concerning telephone conversation with defendant about purchase of revolvers was admissible in trial for first-degree murder over hearsay objection where testimony as to the conversation represented verbal act which formed basis for witness' subsequent action in securing revolvers and delivering them.

23. **Criminal Law** ⇐386

Telephone conversations are competent evidence provided that identity of person with whom conversation was had is estab-

lished by direct evidence, facts or circumstances.

24. Criminal Law ⇐419(1)

Witness' testimony concerning telephone conversation with defendant about revolvers was admissible in trial for first-degree murder over hearsay objection where, although witness did not positively testify that person with whom he spoke was defendant, other facts and circumstances provided basis for conclusion that defendant was person with whom witness spoke.

25. Criminal Law ⇐1174(1)

Trial court did not commit reversible error in refusing to allow defendant's counsel to interview jurors where court conducted inquiry of jurors for juror misconduct.

26. Homicide ⇐354

In prosecution for first-degree murder, facts supporting sentence of death were clear, convincing, and established beyond reasonable doubt.

H. Vernon Davids of the Law Offices of H. Vernon Davids, Winter Garden, for appellant.

Jim Smith, Atty. Gen. and Richard W. Prospect and Gregory C. Smith, Asst. Attys. Gen., Tallahassee, for appellee.

ADKINS, Justice.

This is an appeal from two judgments of murder in the first degree, two judgments of murder in the second degree, two sentences imposing the death penalty and two sentences of life imprisonment. We have jurisdiction. Art. V, § 3(b)(1), Fla.Const. (1972).

On Christmas Eve, December 24, 1975, Eunice Zeigler, wife of defendant (hereinafter referred to as wife), and Perry and Virginia Edwards, parents-in-law of defendant (hereinafter referred to as Perry and Virginia), were shot to death in the W. T. Zeigler Furniture Store in Winter Garden, Florida. In addition, Charles Mays, Jr., (hereinafter referred to as Mays), was beaten and shot to death at the same location. Times of death were all estimated by the medical examiner as within one hour of 8:00 P.M. The defendant was also shot through the abdomen.

The state's theory of the case may be summarized as follows:

Edward Williams had known defendant and his family for a number of years. Williams testified that in June 1975 defendant inquired of him about obtaining a "hot gun." Williams then went to Frank Smith's home and arranged for Smith to purchase two RG revolvers. The revolvers were delivered to defendant. Also, during the latter part of 1975 defendant purchased a large amount of insurance on the life of his wife. Thus was shown the means and the motive.

Mays and his wife came to defendant's furniture store during the morning of December 24 and Mays agreed to meet defendant around 7:00 P.M. The store was closed around 6:25 P.M.

Mays left his home around 6:30 P.M. He went to an Oakland beer joint and saw a friend, Felton Thomas, who accompanied Mays to the Zeigler Furniture Store.

The theory of the state's case is that defendant had two appointments on Christmas Eve, one with Mays and one with Edward Williams. Prior to these appointments he took his wife to the store and in some manner arranged for his parents-in-law to go there. He killed his wife, Eunice, quickly, and for her, unexpectedly, since she was found with her hand in a coat pocket, shot from behind.

Because of the location of her body, Virginia was probably trying to hide among the furniture. Perry probably surprised defendant with his strength and stamina as they struggled for some time. After defendant subdued Perry and rendered him harmless, defendant shot him. Considering the fact that a bullet penetrated Virginia's hand, the state said it was likely she was huddled in a protective position when she was executed.

Defendant then left the store, returning to meet with Mays who had arrived there at

about 7:30. He was probably surprised to see the presence of another man, Felton Thomas, with Mays. He took Thomas and Mays to an orange grove to try the guns. The state says that the purpose of the trip was to get the two to handle and fire the weapons in the bag. From the grove he returned to the store, but was unsuccessful in getting Mays or Thomas to provide evidence of a break-in. He did, however, get Thomas to cut off the lights in the store. The three returned to defendant's home. Defendant got out, went to the garage, came back and took a box of some kind to Mays and told him to reload the gun. They returned to the store. Defendant could not persuade Thomas to enter the store, so Thomas lived. When Thomas disappeared, the defendant returned to his home and picked up Edward Williams. Defendant had killed Mays.

Defendant was successful in getting Williams partially inside the back hallway. Defendant put a gun to Williams' chest and pulled the trigger three times, but the gun did not fire. Williams said, "For God's sake, Tommy, don't kill me," and ran outside, refusing to return to the store. The state says that the empty gun was as much a surprise to defendant as it was to Williams. The state says that in all probability defendant thought he was holding the gun that Mays had shot in the orange grove and which defendant told Mays to reload.

When he was unable to get Williams into the store, the defendant became desperate and conceived the idea that he would appear uninvolved if he happened to be one of the victims. Accordingly, he shot himself and then called Judge Vandevepter's residence where he knew the police officers would be.

The defendant denies that he had any contact with Smith or purchased any guns from him. He says that the increase in the amount of the insurance policy was pursuant to advice on an estate plan. Defendant says that his wife, Perry, and Virginia were killed during the course of a robbery; that Mays was involved in the robbery but was killed by his confederates; that he was shot by the burglars and left to die. The jury obviously did not believe the testimony of the defendant. To have believed his story, the jury would necessarily have had to disbelieve the testimony of Smith, Thomas, and Williams and would have had to have found no significance in the other substantial evidence.

[1] We have carefully examined the extensive record and find that there was substantial evidence upon which the jury verdict could be based, and we find that the evidence was sufficient to sustain the verdict.

The defendant was arrested in his hospital room on December 29, 1975, a preliminary hearing was held January 16, 1976, and the grand jury returned indictments on March 26, 1976. One indictment charged defendant with three counts of first degree murder for the shooting deaths of Eunice Zeigler, Perry Edwards and Virginia Edwards. Another indictment charged defendant with one count of first degree murder for the beating death of Charles Mays, Jr.

An order was filed by the trial court on April 1, 1976, wherein the court advised counsel of his desire to consolidate the two indictments for trial. This order contained the following:

> Based upon representations and discussions between the Court and the Attorneys involved concerning anticipated length of time of the trial and the number of witnesses being spoken of on each side that will be called both in presentation of the State's case as well as in defense, which assertions or representations have gone into the hundreds, and due to the apparent similarity in circumstances surrounding the events leading up to the charges in both of these cases, and considering the expense both to the State and to the defense in two identical trials, this Court is considering entry of an order consolidating the two indictments for a single trial. The purpose of this Order is to so notify counsel of the Court's thoughts at this time and by this Order directing that the parties file with-

this Court, within 15 days from the date of this Order, the objections, if any, they have to such a consolidation for purposes of trial and that such objections, if any, should be specific and should point out the prejudices, if any that would result to either the State or to the defendant in such a consolidation. ...

In its response the state made no objection to the consolidation of the cases and alleged:

1. The facts and circumstances surrounding the deaths of those persons alleged to have been murdered in Indictment 75-3564 would be relevant, material and competent evidence in the trial of that homicide charged against the defendant in Indictment 76-779, and vice versa. ...

2. In the trial of either indictment all of the surrounding circumstances of all of the homicides would be lawfully and probably necessarily made known to the jury.

3. That all of the homicides alleged in the two said indictments were committed during the evening of December 24, 1975, in the same building situate in Winter Garden, Orange County, Florida, and the facts surrounding the same are interwoven and connected with one another.

The defendant in his response objected to the consolidation and alleged:

1. The three homicides alleged in Indictment No. CR 75-3564 are alleged to have occurred through gunshot wounds while the one homicide alleged in Indictment No. CR 76-779 is alleged to be death caused by a blunt instrument.

2. It is the defense's understanding that while the homicides alleged in the two separate indictments are supposed to have occurred during the evening of December 24, 1975, that the proofs that deaths occurred at separate and distinct times with the homicides alleged in CR 75-3564 occurring at one period of time and the alleged homicide in CR 76-779 occurring at a later time.

3. The defense is not yet in possession of sufficient facts and information to determine all paths to be followed by the defense in these cases but it remains a distinct possibility that self-defense will be asserted to response to the charges contained in Indictment No. CR 76-779.

4. For the foregoing reasons and upon the legal precedents enunciated by this Honorable Court in its Order and specifically based upon *Mendez v. State*, 85 So.2d 613 (Fla.1956), the defense does hereby interpose its objection to any consolidation of these two indictments for trial.

The court then entered its order consolidating the indictments for purposes of trial and all future proceedings. The order contained the following:

THIS COURT, in exercise of its inherent power, entered its Order dated April 1, 1976, pertaining to possible consolidation of Indictment 76-779 and 75-3564, both the State and Defendant have filed their response to that Order. In his response, the Defendant has neither claimed, or shown, any prejudice that would result to him from the consolidation.

In entering this Order, the Court has considered the cases cited in the prior Order, plus the following ABA Standards:

1. The Administration of Criminal Justice, Joinder of Offenses and Defendants, § 3.1.

2. Joinder and Severance, § 3.1.

3. The Function of the Trial Judge, §§ 3.8, 3.9.

Florida Rule of Criminal Procedure 3.151(b), in effect at the time of trial, provided as follows:

(b) Two or more indictments or informations charging related offenses shall be consolidated for trial on a timely motion by a defendant. The procedure thereafter shall be the same as if the prosecution were under a single indictment or information. A defendant's failure to timely move for consolidation constitutes a waiver of his right to consolidation. (Emphasis added).

The defendant says that the consolidation of the two indictments over his objections was erroneous in that it was contrary to the provisions of this rule. In support of his contentions the defendant cites *Belote v. State*, 344 So.2d 565 (Fla.1977), which was not available to the trial judge when he entered his ruling. In *Belote* three separate informations charging three separate offenses were filed against the defendant. Trial for the three cases was set by separate order on the same date. On the day of trial the defendant first learned that all three cases had been consolidated *sua sponte*, and objected to such consolidation. The Court in *Belote*, referred to *Kilgore v. State*, 271 So.2d 148 (Fla. 2d DCA 1972). In *Kilgore* the defendant was charged by separate informations with second degree murder and carrying a concealed weapon. On the day of trial, the trial court consolidated the cases without motion being made by either of the parties. The defendant objected to the consolidation on the basis of surprise, and the fact that the separate concealed weapons charge would prejudice him with regard to the second degree murder charge. The Court reasoned that when a consolidation of separate and distinct charges is forced upon a defendant over his objection, there conceivably might be cogent and compelling reasons militating against the consolidation. This Court in *Belote* relied upon *Kilgore* to hold that Belote was denied substantial procedural rights of consolidation over her objection on *such short notice*.

Buttressing its holding, this Court in *Belote* made reference to the fact that the rule in effect at the time of Belote's trial allowed consolidation only upon a defendant's motion.

Unlike the situation in *Belote*, *supra*, and *Kilgore*, *supra*, no short notice or surprise is present in this record. Technically speaking, the court violated the provisions of the rule when the indictments were consolidated by the court on its own motion. However, resolution of this issue must be made in light of demonstrated prejudice resulting from the consolidation. Neither in the trial court nor on appeal has the appellant shown any prejudice. He had full knowledge of charges he had to defend against at trial and the time between consolidation and trial reiterated several months. There is no doubt that even if the cases had been tried separately, there would have been no difference in the state's evidence. In other words, to have proven one case was to have proven the other.

[2] After examination of the entire record it does not appear that this error injuriously affected the substantial rights of the defendant. Therefore, the judgment should not be reversed upon this ground. § 924.33, Fla.Stat. (1979).

[3] Defendant next contends that the failure of the trial court to grant any of his motions for continuances was a denial of adequate time to prepare a defense and a denial of due process. Generally, the action of the trial court on a motion for continuance will not be disturbed on appeal unless there has been a palpable abuse of discretion. *Mills v. State*, 240 So.2d 35 (Fla. 3d DCA 1970).

[4-6] The thrust of the requests for continuance was essentially that defendant needed more time to prepare his defense. Evidence in his motion for continuance the defendant consistently and expressly refused to waive his right to a speedy trial. If a continuance is granted upon the motion of the defendant the speedy trial time is tolled. *State ex rel. Butler v. Cullen*, 253 So.2d 861 (Fla.1971). Obviously the defendant was seeking an extension of time but wanted the trial to be held within the 180-day period specified by the speedy trial rule, Fla.R.Crim.P. 3.191. The trial began on June 1. There were only twenty-one days within the speedy trial time in which the trial could have taken place had the continuance been granted. It is clearly established that the decision to grant or deny a motion for continuance is addressed to the sound discretion of the trial court. *Durran v. State*, 350 So.2d 525 (Fla. 3d DCA 1977). The record does not show an abuse of discretion, so this contention is without merit.

[7-9] Defendant next complains about four separate searches. On the night of the homicide, Officer Yawn was sent to defendant's house by Chief Don Ficke. At the time Ficke had knowledge that the defendant had been involved in a shooting at the store and the officers had a reasonable belief to suspect foul play. The officers certainly had reason to believe that the other members of the family had been involved in some foul play. The officers wanted to determine the location or whereabouts of Eunice and her parents. They arrived at the house and no one was there. The reasonableness of an entry by the police upon private property is measured by the totality of existing circumstances. The right of police to enter and investigate an emergency, without an accompanying intent either to seize or arrest, is inherent in the very nature of their duties as peace officers and derives from the common law. *See United States v. Herndon*, 390 F.Supp. 1017 (S.D. Fla.1975); *State v. Hetzko*, 283 So.2d 49 (Fla. 4th DCA 1973); *Webster v. State*, 201 So.2d 789 (Fla. 4th DCA 1967). The officers arrived at the house and when there was no response, they acted reasonably in entering the house to determine whether any foul play had occurred and to locate Eunice Zeigler and her parents. After finding no one in the house, the officers proceeded to the garage and observed a car belonging to Curtis Dunaway. It was reasonable for the officer to look inside the automobile to see if it contained any evidence of wrongdoing. It was reasonable for the officer to seize the gun located on the rear floor of the automobile which was parked in the garage.

[10] The second search of the house, which defendant says was illegal, was conducted in the early morning of December 25, 1975. The trial court found that this search was a result of a valid consent given by the defendant. Nurse Clark testified that Detective Frye asked her to tell defendant what the consent was, to read it to him, and have him sign it. She read the document to the defendant, asked him if he understood it, and defendant stated that he was willing to sign it. She testified that defendant was alert and that his answers were responsive to questions she asked him. Another nurse testified that at the time defendant was coherent and conscious. There exists in the record clear testimony regarding defendant's mental condition at the time he signed the consent form. The record fully supports the determination of the trial judge that the consent was voluntarily given. *See Bailey v. State*, 319 So.2d 22 (Fla.1975); *Reddish v. State*, 167 So.2d 858 (Fla.1964).

Defendant also assigns as error the order of the trial judge denying his motion to suppress certain items found in the store where the homicides occurred. The trial judge found:

> The evidence is unequivocal that the defendant himself called the police to the store; that there were four dead bodies at the store; that the police were in process of conducting a crime scene investigation which, due to its complexity, continued for more than a week; that the police were legally upon the premises carrying out their required duties. There was nothing illegal or unlawful in so investigating the scene which would require the items taken be suppressed.

If the police officers had gone to the store for a reason other than defendant's invitation, they would have been perfectly entitled to look inside to ascertain the need to offer immediate aid or to see if a killer was still on the premises. In the course of this activity they would have likewise been permitted to seize all evidence that was in their plain view.

[11] Defendant relies upon *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978). The Supreme Court of the United States held that there is no such thing as a crime-scene exception to the Fourth Amendment. The Court acknowledged, however, the right of police officers to respond to emergency situations and the Fourth Amendment does not bar police officers from making warrantless entries when they reasonably believe that either a person within is in immediate need or to see if a killer is still on the premises. The police

may seize any evidence that is in plain view during the course of their legitimate emergency activities.

[12] In the case *sub judice*, the police were at the store as a result of the invitation of the defendant. That invitation removed any application of *Mincey*. Also, the trial judge did not base his ruling on a construction of the Fourth Amendment. The above quoted portion of his order reflects that the basis of the ruling is the fact that defendant called the police to the store. The trial court did not commit error in denying the motion to suppress the items which were found and seized during the officer's presence in the store.

Defendant next contends that the trial court committed reversible error by admitting, over defendant's objection, evidence in violation of Florida Rule of Criminal Procedure 3.220 relating to discovery. Witness Delaney was called as a defense witness out of turn and testified that he examined photographs of the bloody footprints, the shoes of defendant, and comparison prints. Although there were general characteristics of similarity, as an expert he could not find any specific points of identification. He concluded that the prints in question could have been made by defendant's shoes but he could not positively state that the shoes did in fact make the print. At defendant's request, Witness Delaney was excused from further attendance.

The state then called Professor McDonnell as a witness. He testified that he conducted experiments with the shoes. Defendant then objected to any testimony relative to such tests on the basis that he had received no report or any indication that such tests had been conducted. In support of his objection the defendant relies upon *Cumbie v. State*, 345 So.2d 1061 (Fla.1977) where the existence of statements made by a defendant was not disclosed during depositions taken by the defense of two officers who were called as witnesses by the state, and no inquiry was made into the prejudice resulting to the defendant. The court held that reversible error was committed.

[13] A trial court has discretion in determining whether non-compliance with the discovery rule results in harm or prejudice, but that discretion can be properly exercised only after the court has made an adequate inquiry into all of the surrounding circumstances. *Iaveman v. State*, 357 So.2d 703 (Fla.1978). When the trial court, *sub judice*, became aware that a non-disclosure had occurred, it inquired of the defendant how long he wished to examine Witness McDonnell and his evidence. Defendant replied at least thirty minutes. Trial was recessed and apparently defendant received the time he requested.

[14, 15] The failure to observe and comply with the rule of discovery should be remedied in a manner consistent with the seriousness of the breach. *Cooper v. State*, 336 So.2d 1133 (Fla.1976). Here Witness Delaney had testified that he performed the tests with shoes using printers ink, while Witness McDonnell performed tests using human blood. Defendant claimed that he had not known about or seen the experiment regarding the shoe prints made in blood. The obvious remedy consistent with the breach would be to allow him the necessary time to do so. The trial judge did this. This case is remarkably different from *Cumbie*, where the prosecution responded falsely to a demand for discovery. When it proposed to introduce testimony contrary to that response, the trial court failed to make any inquiry and failed to afford any remedy to the defendant. In contrast, the facts *sub judice*, clearly show that the state did not falsely respond to a discovery demand but rather failed to disclose the fact that Witness McDonnell had performed experiments during the course of the trial. A remedy was afforded and defendant then became aware of what Witness McDonnell had done. Actually, there was very little contradiction between the testimony of Delaney and the testimony of McDonnell. The failure of the state to observe and comply with the rule of discovery was remedied in a manner consistent with the seriousness of the breach and the trial judge did not commit reversible error in admitting this evidence.

[16, 17] The defendant argued that the trial judge committed reversible error in admitting certain fingerprint evidence as well as in admitting into evidence a bullet reportedly taken from an orange grove where defendant is alleged to have taken Thomas and Mays to fire guns. His argument is based upon the principle that fingerprint evidence is inadmissible unless the circumstances are such that the print could have been made only at the time the crime was committed, citing *Knight v. State*, 254 So.2d 387 (Fla. 4th DCA 1971). Unless it is known when a fingerprint was placed on a particular item in a particular location, that fingerprint is an insufficient circumstance on which to base guilt. In the case *sub judice* the fingerprint evidence was not the sole basis on which the prosecution rested. The purpose of introducing the fingerprint and the bullet into evidence was to corroborate the testimony of state's witnesses. Under the circumstances of this case, the trial judge did not commit reversible error in admitting the fingerprint evidence as well as the bullet. *See Bryant v. State*, 235 So.2d 742 (Fla.1970).

[18] Everything which was sent to the FBI was returned to us virtually the same [illegible] with the exception of necessary alterations for the purpose of testing and identification. This was a sufficient predicate showing chain of custody. *See Dixon v. State*, 216 So.2d 85 (Fla. 2d DCA 1968) (defendant's argument that there was an insufficient showing of a chain of custody of his clothes was without merit.) The defendant has failed to show the trial court abused its discretion in admitting these challenged items into evidence.

[19] Dr. Mackler, defendant's psychiatrist, had conducted a sodium butathol test and a video tape presentation of Dr. Mackler's interview with the defendant had been presented to the grand jury. A proffer of this testimony was made at trial and defendant says the trial judge committed error in not allowing it into evidence. The trial court also refused to allow the testimony of Dr. Allan Zimmer, another psychiatrist. The results of a sodium butathol test are not admissible in a criminal prosecution. There would be no way to cross-examine defendant when he was making revelations of fact, which according to him, he could not otherwise remember. Such evidence would be hearsay. *See Crouch v. State*, 201 So.2d 706 (Fla.1967). The rationale supporting the well established rule that results of a polygraph examination are inadmissible is equally applicable to the result of a sodium butathol test. *See Sullivan v. State*, 303 So.2d 632 (Fla.1974), *State v. Riggins*, 348 So.2d 1339 (Fla. 4th DCA 1977); *Crawford v. State*, 321 So.2d 559 (Fla. 4th DCA 1975), approved in *State v. Crawford*, 345 So.2d 214 (Fla.1976).

[20] Also the trial judge properly excluded the testimony of the psychiatrist, Dr. Zimmer. Defendant's sanity was never an issue at trial. During the guilt phase of the trial, testimony regarding the mental state of a defendant in a criminal case is inadmissible in the absence of a plea of not guilty by reason of insanity. *Tremain v. State*, 336 So.2d 705 (Fla. 4th DCA 1976).

The defendant next contends that the trial court committed reversible error when he admitted Frana Smith's alleged conversation with the defendant because the conversation was over a telephone and the evidence was therefore hearsay. Edward Williams testified that the defendant inquired of him about obtaining a "hot gun" sometime in June prior to the homicides. Williams went to Frana Smith's home and in Smith's presence called the defendant. Williams told defendant that Smith did not have any guns at that time and defendant told Williams to put Smith on the telephone. Williams handed Smith the telephone, Smith spoke to someone who identified himself as Tommy Zeigler. As a result of that conversation Smith purchased two .357 revolvers at the Diamond Jim Pawn Shop in Orlando from Mary Pringle. After he purchased the guns he called a number that was given to him by the person with whom he had spoken in Edward Williams' presence. The phone was answered: "This is Zeigler Furniture Store." Smith asked for Tommy Zeigler and the voice responded,

"This is he speaking." Smith recognized that voice as belonging to the person with whom he had spoken during the first conversation. Smith told the person what kind of guns he had and how much they would cost and the person agreed. Later defendant called Williams and asked him to go over to Smith's house and pick up a package. Defendant gave Williams a sealed envelope which he gave to Smith in return for a paper sack in which he saw the butts of two guns. Smith testified that he received the money from Williams and that he gave Williams a paper bag containing the two RG revolvers.

[21, 22] In cases in which the fact that a telephone call was made or received becomes relevant by reason of its bearing upon a material issue, the fact may become admissible in evidence as an independently relevant one irrespective of the substance or narration involved, or the truth or falsity thereof. Annot., 13 ALR 2d 1411, 1412 (1950). *See Chacon v. State*, 102 So.2d 578 (Fla.1957). Utterances are exempt from the hearsay rule. For example, utterances which accompany a material, equivocal act, and serve to complete the act and give it definite legal significance are exempt from the hearsay rule. *See 6 Wigmore on Evidence*, § 1766 at 177 (3d ed. 1976). Smith's testimony concerning the telephone conversation represented a verbal act which formed the basis for his subsequent action in securing the two RG revolvers and delivering them to Williams.

[23, 24] The other theory which supports the trial court's ruling is that telephone conversations are competent evidence provided that the identity of the person with whom the conversation was had is established by direct evidence, facts or circumstances. 7 *Wigmore on Evidence*, § 2155 (3d 1978). The admissibility of these conversations is governed by the same rules of evidence concerning face-to-face conversations except the party against whom the conversations are sought to be used must be identified. Although Smith did not positively testify that the person with whom he spoke was defendant, other facts and circumstances provided the basis for the conclusion that defendant was the person with whom Smith spoke. Circumstances both preceding and following the conversation sufficiently identified the caller as defendant. The completeness of the identification went to the weight of the evidence rather than to its admissibility. The trial court correctly ruled that Smith's testimony was admissible.

The defendant complains of the manner in which Juror Young was excused and the alternate juror seated. He also questions the propriety of numerous consultations prior to the rendition of the verdict among the court, attorneys, bailiffs, clerk, nurse, and a juror. The trial judge's action demonstrates the exercise of sound discretion. The defendant has failed to demonstrate reversible error in the circumstances surrounding the deliberations of the jury.

[25] Defendant filed a request to interrogate the jurors. He claimed that he had no intention of delving into how the jurors conducted their deliberations, however, his effort to determine the existence of "juror misconduct" would necessarily have accomplished the same thing. An interview of jurors was held by the trial court, but defendant complains that he did not get the chance to conduct the interviews. Inquiry by the trial court evaporated any grounds, either real or imagined, for defendant's motion to interview the jurors. The trial court did not commit reversible error in refusing to allow defendant's counsel to interview the jurors.

Defendant testified that he was attacked by unknown assailants. He related how he fought with his attackers, how he was in and out of consciousness and how he suffered a gunshot wound and heard the unknown voice directing that Charles Mays or someone be killed. The jury rejected this defense and the evidence, as previously discussed, was ample to sustain the verdict of the jury.

By its verdict the jury found proof beyond a reasonable doubt that defendant had committed four murders within the course

of two hours. He killed Eunice quickly and for her, unexpectedly. She was shot from behind. With Eunice dead, defendant then shot his in-laws. Perry struggled with the defendant. Defendant subdued Perry, rendered him harmless, and shot him once while he lay on the floor. Defendant then went in search of Virginia, found her and shot her in the head. The evidence shows that these people were killed prior to 7:30 P.M.

By 9:00 P.M. he had murdered Mays in furtherance of a crafty design to focus attention on others as the murderers. Defendant could not persuade Thomas to enter the store so Thomas survived. He got Williams partially inside the back hallway, turned on him and tried to shoot him in the chest. The gun failed to fire, so Williams survived.

By this time, defendant was very desperate. He had four bodies in the store and little, if anything, to support the appearance of a surprise robbery and massive shootout. He would not appear to be involved if he happened to be one of the victims. Accordingly, he shot himself and called the police for help.

[25] The jury returned a verdict of first degree murder for the homicides of Eunice and Mays and a verdict of second degree murder for the homicides of Virginia and Perry. After the sentencing procedure, the jury recommended life imprisonment. The trial judge overruled the recommendation of the jury and imposed the sentence of death for the murders of the wife and Charles Mays. The following findings of fact were filed by the trial judge:

> Florida Statutes 921.141(3) requires specific written findings of fact when a sentence of death is imposed. Additionally, it is recognized that the Florida Supreme Court has set forth, in addition to the enumerated statutory factors relative to "aggravating" and "mitigating" circumstances, the admonishment that "... in order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." *Tedder v. State*, 322 So.2d 908, 910 ([Fla.]1975). In following the statute (Fla.Stat. 921.141), the trial judge is directed to weigh the statutory aggravating and mitigating circumstances when determining the appropriate sentence to be imposed in light of all the facts adduced. In short, the trial judge must justify imposition of a sentence of death, which must be in writing, applying the facts of the case to legislatively mandated criteria.
>
> "When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in Fla. Stat. § 921.141(7), F.S.A. All evidence of mitigating circumstances may be considered by the judge or jury." *State v. Dixon*, 283 So.2d 1, 9 (Fla.1973).
>
> "It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of x number of aggravating circumstances and x number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present." *State v. Dixon*, supra, at pg. 10.
>
> First, a consideration of the "aggravating" factors as found in the evidence and established by the verdicts returned by the jury.
>
> (a) Defendant was not under sentence of imprisonment at the time he committed the four murders in these cases.
>
> (b) Defendant, at the time he committed the four murders, had not been previously convicted of another capital offense or of a felony involving violence or threat of violence.
>
> (c) Defendant, at the time he committed the murders, did knowingly create a risk of death to many persons.
>
> (d) Although open to a different interpretation, the Court does not find that

the murders were committed while Defendant was engaged in any robbery, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb.

(e) The murder of Charles Mays was committed by the Defendant to cover up the fact he had earlier murdered his wife and in-laws and thus, was committed for the purpose of avoiding or preventing a lawful arrest.

(f) The murder of Eunice Zeigler was committed for pecuniary gain—*i. e.*, collect $500,000.00 in insurance benefits. The murders of Charles Mays, Virginia Edwards and Percy Edwards were committed in furtherance of his plan to murder his wife for the money and to have it appear she was killed by Charles Mays and others in perpetration of a robbery or a breaking and entering.

(g) The murder of Eunice Zeigler was not for the purpose of disrupting or hindering the lawful exercise of any governmental function or enforcement of laws, it is arguable that the killing of Charles Mays (also Mr. & Mrs. Edwards) was for purpose of disrupting or hindering enforcement of the law, *i. e.*, to escape prosecution and detection for the murder of Eunice Zeigler and her parents by attempting to cast blame for these killings on Charles Mays.

(h) The murders of Eunice Zeigler and Charles Mays were especially heinous, atrocious, and evil. The evidence establishes that the killings, including those of Mr. & Mrs. Edwards, were in fact extremely wicked, shockingly evil, outrageously wicked and vile and designed to inflict a high degree of pain with utter indifference to their suffering, and committed without any pity or apparent remorse.

The statements made by the Court at time of sentencing, and later reduced to writing and filed in this proceeding, are also incorporated into this written finding, by reference, and made a part hereof.

Having found sufficient "aggravating" circumstances exist which justify and require imposition of the death sentence, it becomes necessary to determine whether or not sufficient mitigating circumstances exist which outweigh the aggravating circumstances.

The evidence establishes:

(a) The Defendant has no significant history of prior criminal activity.

(b) The murders were not committed by Defendant while under the influence of extreme mental or emotional disturbance.

(c) None of the victims were participants in the Defendant's conduct nor did any of them consent to his acts or actions.

(d) Defendant was the sole participant and perpetrator of the murders in question.

(e) Defendant did not act under extreme duress nor was he under the substantial domination of another person at the time he committed the murders.

(f) Defendant suffered no impairment of mental capacity.

(g) Defendant was thirty years old when the crimes were committed.

The aggravating circumstances have been proved to the exclusion of any reasonable doubt. Only one mitigating factor is present—the Defendant has no significant history of prior criminal activity—which is not sufficient to override the aggravating circumstances present.

No useful purpose would be served by a recitation of the facts and evidence in these cases—they are a matter of record and nothing herein stated can or could change them. It is the facts which require this Court to not accept the jury recommendations of life imprisonment and to impose the death sentence. In reaching this conclusion, this Court has reviewed and attempted to follow the law and procedure heretofore enunciated by the Florida Supreme Court in its decisions relative to imposition of a sentence of death and as approved by the United States Supreme Court in *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

The question of whether the murder of Eunice Zeigler was especially heinous, atrocious, and evil becomes immaterial when all of the aggravating and mitigating factors are considered. The trial judge obviously concluded that the facts surrounding this mass murder and suggesting a sentence of death were so clear and convincing that virtually no reasonable person could differ. Although the physical act of killing Eunice by shooting her from behind did not fall within this Court's definition of the statutory factor, "especially heinous, atrocious, and cruel," the fact that she was murdered for pecuniary gain and defendant knowingly created a risk of death to others by virtue of the overall scheme of a planned mass homicide could certainly be given consideration by the trial judge. This court has affirmed the trial court's override of a jury recommendation of life based on facts showing equal or even less aggravating factors. *See Gardner v. State*, 313 So.2d 675 (Fla.1975) vacated *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), and *Sawyer v. State*, 313 So.2d 680 (Fla.1975). Subsequent to *Tedder v. State*, 322 So.2d 908 (Fla.1975), we affirmed a trial court's override of a jury recommendation of life in *Douglas v. State*, 328 So.2d 18 (Fla.1976); *Dobbert v. State*, 328 So.2d 433 (Fla.1976); *Barclay v. State*, 343 So.2d 1266 (Fla.1977); and *Hoy v. State*, 353 So.2d 826 (Fla.1978).

The facts supporting the sentence of death are clear, convincing, and are established beyond a reasonable doubt.

We have carefully examined the thirty-two volumes of the record in this case and carefully considered the brief of the defendant. In some instances defendant has been able to show certain inconsistencies in the evidence. However, when one considers the magnitude of this case, all facts could not be expected to match perfectly. The defendant has not shown anything in his brief which purports to be a reasonable hypothesis of innocence. An examination of the evidence presented to the jury does not and cannot lend itself to such a construction. Defendant has had a fair trial and the other questions presented by him in his brief are without merit.

It is therefore our opinion that the judgments and sentences should be affirmed.

It is so ordered.

BOYD, OVERTON and ALDERMAN, JJ., concur.

SUNDBERG, C. J., and ENGLAND, J., concur in conviction but dissent as to sentence.

APPENDIX B*

§ 921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(1) Separate proceedings on issue of penalty. -- Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury. -- after hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentence of death. -- Notwithstanding the recommendation of a

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*This text is of the statute currently in force. Minor changes were made in the Laws of 1979, c. 79-353: substituted in the fifth sentence of subsection (1), "to the nature of the crime and the character of the defendant" for "to sentence"; deleted in subsections (2)(b) and (3)(b), "as enumerated in subsection (6)"; and added subsection (5)(i), the aggravating circumstance of "cold, calculated and premeditated manner without any pretense of moral or legal justification."

majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) Review of judgment and sentence -- The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances. -- Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) Mitigating circumstances. -- Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

APPENDIX C

SURVEY OF STATE CAPITAL SENTENCING STATUTES

1. Life Sentence Imposed Unless Jury Unanimously Recommends Death Sentence

ARKANSAS	Crim. Code § 41-1301-1302 (1977)
COLORADO	Rev. Stat. § 16-11-103 (1979)
DELAWARE	Code Ann. tit.11, § 4209 (1979)
GEORGIA	Code Ann. § 26-3102, § 27-2302 (1978)
ILLINOIS	Ann. Stat. ch. 38, § 9-1 (1979)
LOUISIANA	Code Crim. Pro. Ann. art. 905.8 (West Supp. 1980)
MARYLAND	Code Ann. art. 27, § 413 (Supp. 1980)
MASSACHUSETTS	Gen. Laws Ann. ch. 279, § 54 (1979)
MISSISSIPPI	Code Ann. § 99-19-101 (Supp. 1979)
MISSOURI	Crim. Code § 565.006 (Vernon, 1979)
NEW HAMPSHIRE	Rev. Stat. Ann. § 630.5 (Supp. 1979)
NEW MEXICO	Stat. Ann. § 31-20A-3 (Supp. 1980)
NORTH CAROLINA	Gen. Stat. § 15A-2000 (1978)
OKLAHOMA	Stat. Ann. tit.21, § 701.11 (West Supp. 1980-1981)
PENNSYLVANIA	18 Cons. Stat. Ann. § 1311 (Purdon Supp. 1980)
SOUTH CAROLINA	Code § 16-3-20 (Supp. 1979)
TENNESSEE	Code Ann. § 39-2404 (Supp. 1980)
UTAH	Crim. Code Ann. § 76-3-207 (1978)
VIRGINIA	Code § 19.2-264.4 (Supp. 1980)
WYOMING	Stat. § 6-4-102 (1977)

2. Jury Life Sentence Binding

CALIFORNIA	Penal Code § 190.3-190.4 1979)
CONNECTICUT	Rev. Stat. § 53a-46a (Supp. 1979)
KENTUCKY	Rev. Stat. Ann. § 532.025 (Baldwin Supp. 1980)
NEVADA	Rev. Stat. Ann. § 175.554 (1979)
SOUTH DAKOTA	Codified Laws Ann. § 23A-27A-4
TEXAS	Code Crim. Pro. Ann. art. 37.071 (Vernon Supp. 1978)
WASHINGTON	Rev. Code Ann. § 10.94.020 (Supp. 1980)

3. Jury Life Sentence Not Binding

FLORIDA	Stat. Ann. § 921.141 (West Supp. 1980)
INDIANA	Code Ann. § 35-50-2-9 (1979)

4. Sentence Imposed By Judge Alone

ARIZONA	Rev. Stat. Ann. § 13-454 (Supp. 1978)
IDAHO	Code § 19-2515 (Supp. 1978)
MONTANA	Rev. Code Ann. vol. 9, § 46-18-301 (1977)
NEBRASKA	Rev. Stat. § 29-2520 (1979)
OREGON	Rev. Stat. § 163.116 (1979)

Opposition

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No. 81-5908

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

WILLIAM THOMAS ZEIGLER, JR.

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

JIM SMITH
Attorney General

GEORGE R. GEORGIEFF
Assistant Attorney General

GREGORY C. SMITH
Assistant Attorney General

COUNSEL FOR RESPONDENT

The Capitol, 1502
Tallahassee, FL 32301-8048
(904) 488-0290

TABLE OF CITATIONS

CASES	Page
Bullington v. Missouri, ___ U.S. ___ 68 L.Ed.2d 270 (1981)	10,11
Chambers v. Mississippi, 410 U.S. 284 (1973)	12
Dobbert v. Florida, 432 U.S. 282 (1977)	9,10,11
Lisenba v. California, 314 U.S. 219 (1941)	12
Mincey v. Arizona, 437 U.S. 385 (1978)	2,3,5, 5
Proffitt v. Florida, 428 U.S. 242 (1972)	8,10,11
Schneckloth v. Bustamonte, 412 U.S. 218 (1973)	2,4,5, 6,7
Tedder v. State, 322 So.2d 908 (Fla. 1975)	9
Townsend v. Sain, 372 U.S. 293, 307-309 (1963)	6,7
United States v. DiFrancesco, ___ U.S. ___, 66 L.Ed.2d 328 (1980)	11
United States v. Peltier, 422 U.S. 531 (1975)	5
Zeigler v. State, 402 So.2d 365 (Fla. 1981)	2,6

OTHER AUTHORITY	
Section 921.141, Florida Statutes	1
Fourth Amendment, United States Constitution	1,8
Fifth Amendment, United States Constitution	1,8
Sixth Amendment, United States Constitution	1,8
Eighth Amendment, United States Constitution	1,8
Fourteenth Amendment, United States Constitution	1,8

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
ARGUMENT	2
I. WHETHER THE JUDGMENT AND SENTENCE IN THE STATE COURT WERE BASED IN PART ON EVIDENCE OBTAINED IN VIOLATION OF PETITIONER'S RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES.	2
A. The Florida Supreme Court Did Not Misapply This Court's Decision in Mincey v. Arizona, 437 U.S. 385 (1978)	2-6
B. Whether the Supreme Court Misapplied the Voluntariness Principles of Schneckloth v. Bustamonte, 412 U.S. 218 (1973), and Townsend v. Sain, 372 U.S. 293, 307-309 (1963)	6,7
II. WHETHER ALLOWING THE TRIAL JUDGE TO OVERRIDE THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT VIOLATES PETITIONER'S CONSTITUTIONALLY PROTECTED RIGHTS.	8
A. Whether Florida's Statutory Scheme Which Involves the Jury in Advising the Trial Court as to What Sentence to Impose, Violates Petitioner's Due Process Rights.	8,9
B. Whether This Court's Recent Ruling in Bullington v. Missouri, 101 S.Ct. 1852 (1981), Requires That Under a Sentencing Scheme Such as Florida's, Double Jeopardy Protections are Triggered by a Jury Recommendation of Life Imprisonment.	10,11
III. WHETHER THE TRIAL COURT IMPROPERLY EXCLUDED EVIDENCE PETITIONER SOUGHT TO INTRODUCE CONSISTING OF STATEMENTS WHICH HAD BEEN MADE WHILE PETITIONER MAD BEEN INJECTED WITH A "TRUTH SERUM."	11,12
CONCLUSION	12
CERTIFICATE OF SERVICE	13

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Petitioner,

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Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Florida is reported at 402 So.2d 365 (Fla. 1981).

JURISDICTION

Respondent concedes that petitioner's statement of jurisdiction is correct.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Respondent agrees that the issues asserted by Petitioner assert violations of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

2. Additionally, Respondent accepts the statement that a challenge is made to § 921.141, F.S.

ARGUMENT

I. WHETHER THE JUDGMENT AND SENTENCE IN THE STATE COURT WERE BASED IN PART ON EVIDENCE OBTAINED IN VIOLATION OF PETITIONER'S RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES.

A. The Florida Supreme Court Did Not Misapply This Court's Decision in Mincey v. Arizona, 437 U.S. 385 (1978).

By characterizing the justification for the warrantless search of his furniture store as one based on a crime-scene exception to the warrant requirement, petitioner seeks to establish that the Supreme Court of Florida misapplied this court's ruling in Mincey v. Arizona, 437 U.S. 385 (1978).

The Florida Supreme Court stated in its decision, Zeigler v. State, 402 So.2d 365 (Fla. 1981), that Mincey cannot apply to the instant case since the factual setting herein is different from that in Mincey. As stated in the petition, this Court in Mincey held that there existed no "crime-scene" exception to the requirement that warrants for searches be procured. Searches conducted without prior review by a judge or magistrate are per se unreasonable unless the facts allow the operation of specifically drawn exceptions. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Beyond a finding of mere consent here, the trial court found that the police officers were on petitioner's premises by invitation.

Focusing on the testimony of certain police officers, petitioner makes the statement that the search was necessarily based on the "crime-scene" rationale. Notwithstanding the views held by certain of the officers who conducted the search, the fact that Zeigler initiated the contact with police and requested them to "please come" demonstrates that there was an invitation, thus consent to search.

Examining the order of the trial court on the motion to suppress, it becomes apparent that here, unlike Mincey, there was no reliance on a bastard exception to the Fourth Amendment. The court relied on Zeigler's request that police come to the store in finding that the Motion to Supress was properly denied.

> The evidence is unequivocal that the defendant himself called the police to the store; that there were four dead bodies at the store; that the police were in the process of conducting a crime-scene investigation which, due to its complexity, continued for more than a week; that the police were legally upon the premises carrying out their required duties. There was nothing illegal or unlawful in so investigating the scene which would require the items taken to be suppressed.

(Vol.IV, p. 11)

It must be remembered that the invitation was critical to petitioner's scheme for avoiding prosecution. The keystone to the entire scheme was very definitely police presence in the store and the viewing of the scene and evidence the way petitioner wanted it viewed. The impassioned plea for aid made by petitioner to the police was the catalyst on which petitioner relied to start the whole process in motion. It was this invitation which was critical to the entire matter. By inviting the police to the store, petitioner very clearly wanted them to get the impression that Eunice and/or her parents had caught Mays and others in the process of committing a burglary and/or robbery. He hoped the police would arrive at the conclusion that a large-scale shootout occured and as a result thereof the four victims met their death. He, at that time, presumably would have cast suspicion on Williams as a perpetrator and the apparent reason petitioner was attacked, shot, and left for dead was that Williams wanted to eliminate the only remaining person who could possibly point a finger at him. Petitioner maintained the orchestration probably up until he began to get an idea of the evidence against him. During the time immediately following the

incident, petitioner had no way of knowing that the supposedly untraceable guns were, in fact, quite traceable through Frank Smith and Mary Pringle; he had no way of knowing that Charles Mays had left the gun in the back of Dunaway's car; he had no way of knowing that a bullet would be found in the orange grove; he had no way of knowing that Thomas Hale saw him and his wife headed towards the store at 7:05 p.m.; and ultimately, he had no way of knowing that evidence, when viewed through the eyes of trained detectives, would not and did not support his version of what happened. The very best petitioner could hope to expect was that he could win a swearing contest over Edward Williams and Felton Thomas. After all, he knew full well that they knew. Because of Williams and Thomas and what they knew we venture into the area of speculation and submit that petitioner was probably not that surprised when he was arrested; he had to at least expect that, based on statements Williams and Thomas could give to the police.

Once the state's case against petitioner began to take shape, petitioner probably realized that his ploy had been unsuccessful. It was then, by moving to suppress, that he took the position that his invitation was conditional. In other words, the invitation was proper, provided that the police found only what he wanted them to find but once the police found too much, the invitation became non-existent. We submit that petitioner's effort to enjoy the best of both worlds should not only be recognized as exactly that but also used to estop petitioner from prevailing.

This Court in Schneckloth, supra, has held that for consent to be present, there need not be the same knowing waiver as in the protection of petitioner's right to a fair trial. This Court stated:

> Almost without exception, the requirement of a knowing and intelligent waiver has been implied only to those rights which the Constitution guarantees to a criminal

> defendant in order to preserve a fair trial.

Schneckloth v. Bustamonte, at 237. As such, Petitioner need not have known the ultimate scope of the consent in order to have given it voluntarily.

To illustrate, respondent poses this hypothetical. Suppose that an individual wishing to defraud an insurance company makes a claim alleging that certain jewelry which was insured had been stolen. To further his claim, he broke into his house so that there would be evidence of an intrusion. Part of the ruse included calling the police so that the pretended theft could be reported. When the police arrived, the police conducted a search pursuant to the invitation issued by the homeowner. If, pursuant to that search, the police officers find contraband, the defendant would not be allowed to assert that the consent to search which he gave was limited to those areas he wished to have searched and no others.

The analogy to the instant case is clear. Zeigler sought to further his version of the facts by asking police officers to view the premises. At that time, he had no idea that the investigation would lead to incriminating evidence. But once consent had been given, it remained intact so that he is unable to complain that the scope of his consent did not include the incriminating items.

Petitioner states that respondent argued before the Florida Supreme Court that Mincey should not be applied retroactively to the search of petitioner's store. Pursuant to this Court's holding in United States v. Peltier, 422 U.S. 531 (1975), it is obvious that Mincey should not be applied retroactively in the context of the exclusionary rule. This Court stated in Peltier:

> The teaching of these retroactivity cases is that if the law-enforcement officers reasonably believed in good faith that evidence they had seized was admissible at trial, the "imperative of judicial integrity" is not offended by the introduction into evidence of that material even if decisions subsequent to the search or seizure have broadened the exclusionary rule to encompass evidence seized in that manner.

Id. at 537. It, therefore, appears that petitioner's lengthy argument concerning the applicability of Mincey is for naught, since, without regard to whether the facts sub judice present a Mincey question, Mincey cannot be applied retroactively in the case at bar.

B. Whether the Supreme Court Misapplied The Voluntariness Principles of Schneckloth v. Bustamonte, 412 U.S. 218 (1973), and Townsend v. Sain, 372 U.S. 293, 307-309 (1963).

Petitioner next argues that the Florida Supreme Court misapplied the principles of Schneckloth v. Bustamonte, supra, and Townsend v. Sain, supra. The Florida Supreme Court stated:

> The second search of the house, which defendant says was illegal, was conducted in the early morning of December 25, 1975. The trial court found that this search was a result of a valid consent given by the defendant. Nurse Clark testified that Detective Frye asked her to tell defendant what the consent was, to read it to him, and to have him sign it. She read the document to defendant, asked him if he understood it, and defendant stated that he was willing to sign it. She testified that defendant was alert and his answers were responsive to the questions she asked him. Another nurse testified that at the time defendant was coherent and conscious. There exists in the record clear testimony regarding defendant's mental condition at the time he signed the consent form. The record fully supports the determination of the trial judge that the consent was voluntarily given.

Zeigler v. State, 402 So.2d 365, at 371.

Again, the factual setting in the state court removes this case from the operation of Townsend or Schneckloth.

In Townsend, this Court's concern was expressed thusly:

> It is difficult to imagine a situation in which a confession would be less the product of a free intellect, less voluntary, than when brought about by a drug having the effect of a truth serum.

Id. at 307, 308. The drug administered to Petitioner cannot be considered a truth serum. Schneckloth similarly does not apply. This Court in Schneckloth dealt with the question of whether the consenting party must be aware that consent may be withheld. The voluntariness of consent must be viewed from a totality and one of the factors which may be considered is whether the individual understood that he had the right to refuse consent. The facts presented herein clearly demonstrate that neither of the above cases apply. In addition to the facts stated in the opinion of the Supreme Court of Florida, the following testimony from Nurse Clark was also presented to the trial court. Nurse Clark specifically stated to petitioner that the officers would have liked him to sign the document if he consented to it. (Vol.VII, p. 69) She also told petitioner that he did not have to sign it (Vol.VII, p. 72). On rebuttal, Nurse Clark testified that based on her experience, the dose of morphine administered to petitioner had never resulted in a person becoming unconscious or incapable of comprehending. (Vol.VII, p. 91)

We are not presented with a Townsend situation, since the morphine that was administered could not be considered a truth serum. Additionally, there is ample testimony that the drug which was administered did not impair the mental functioning of petitioner to the extent that his consent was less than voluntary. Therefore, the language of Schneckloth dealing with the finding of a voluntary consent is not offended.

II. WHETHER ALLOWING THE TRIAL JUDGE TO OVERRIDE THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT VIOLATES PETITIONER'S CONSTITUTIONALLY PROTECTED RIGHTS.

A. Whether Florida's Statutory Scheme Which Involves the Jury in Advising the Trial Court as to What Sentence to Impose, Violates Petitioner's Due Process Rights.

Petitioner alleges that his Fifth, Sixth, Eighth, and Fourteenth Amendment rights have been violated by the fact that the jury recommended life and that subsequently the sentence of death was imposed by the trial court. Further, he alleges that once the jury has been allowed the advisory role, it is violative of due process protections for the judge to override that advice and impose the death penalty. Petitioner correctly notes that several of the States require that the jury recommendation be binding on the trial court. However, this statutory scheme has not been enacted in Florida, and the statutory scheme which contemplates the jury override has been approved by this Court on more than one occasion.

Initially in Proffitt v. Florida, 428 U.S. 242 (1972), this Court reviewed the propriety of Florida's statute in toto and concluded that it was constitutionally sound. One aspect which figured prominently in this Court's decision was that the sentence was imposed by the judge and not the jury. This Court reasoned as follows:

> [I]t has never been suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.

Proffitt, supra, at 252.

Rather than being in violation of petitioner's constitutionally protected rights, the imposition by the trial judge of the sentence of death lends consistency to the application of the penalty. Further, this Court was presented with a death penalty case wherein the trial court had imposed death against the jury's recommendation of life imprisonment in Dobbert v. Florida, 432 U.S. 282 (1977). In Dobbert, this Court stated in footnote 9:

> The fact that the trial judge imposed the death sentence after the jury had recommended life in this case in no way denigrates the procedural protections afforded by the new procedure. The judge did so in circumstances where there were obvious and substantial aggravating factors, and where there had been no significant mitigating factors adduced. To demonstrate that it was the nature of the crime, rather than the scope of the procedure, that resulted in the death sentence in this case, we set forth in extenso the conclusions of the trial court at the sentencing phase.

Id. at 296.

Recognizing Tedder v. State, 322 So.2d 908 (Fla. 1975), this Court in Dobbert, supra, found no infirmity where death is imposed in spite of the ten-to-two recommendation of the jury.

Petitioner argues that it is improper for the judge to use his discretion to defeat the finality of the jury's conclusions. This is a misapprehension of Florida law. The jury's recommendation is not final. If it were, then Florida's statute would be the same as in those twenty-seven states cited by petitioner. Petitioner was never promised the right to sentencing by the jury. He was able to present mitigating evidence to the jury to influence their advisory role, but he never was entitled as a matter of right to a sentence which followed the advisory recommendation of the jury.

B. Whether This Court's Recent Ruling in Bullington v. Missouri, 101 S.Ct. 1852 (1981), Requires That Under a Sentencing Scheme Such as Florida's, Double Jeopardy Protections are Triggered by a Jury Recommendation of Life Imprisonment.

Petitioner cites to the recent decision of this Court in Bullington v. Missouri, ___ U.S. ___, 68 L.Ed.2d 270 (1981), as authority for the proposition that when the jury recommends that life imprisonment be imposed, double jeopardy provisions bar the trial court's sentencing the defendant to death. Bullington, however, does not affect this Court's previous decision in Proffitt, supra, and Dobbert, supra, which uphold the Florida sentencing statute. In Bullington, the facts presented to the court reveal that the jury, the sentencing body in Missouri, sentenced Bullington to life imprisonment at his first trial. Said conviction was reversed based on other grounds and upon retrial, death was imposed by a second jury. This Court held that under Missouri law, because the state had to prove to the sentencer that death was appropriate, when the first jury imposed life imprisonment, the jury sentencing Bullington at his second trial could impose no higher sentence than life imprisonment. Likening the jury sentencing power to that of determining guilt or innocence, this Court reasoned that the second jury could not impose death after Bullington had been "found innocent" regarding the imposition of the death penalty.

> Because the sentencing proceeding at petitioner's first trial was like the trial on the question of guilt or innocence, the protection was afforded by the double jeopardy clause to one acquitted by a jury also is available to him, with respect to the death penalty, at his retrial. We therefore refrain from extending the reasoning of Stroud v United States, [citation omitted], to this very different situation.

68 L.Ed.2d, at 284. As Petitioner notes in his Appendix C, Missouri is one of twenty states which by statute require that

life be imposed unless the jury unanimously recommends death.

Respondent would submit that the decision out of this Court in United States v. DiFrancesco, ___ U.S. ___, 66 L.Ed.2d 328 (1980), (which was distinguished in Bullington), is authority for the fact that a jury recommendation is not the degree or level of finality of an acquittal and therefore the double jeopardy clause is not applicable. The principle announced in Bullington cannot be separated from the factual situation that was presented to this Court in that case. To hold otherwise, would require a retreat from Proffitt and Dobbert.

III. WHETHER THE TRIAL COURT IMPROPERLY EXCLUDED EVIDENCE PETITIONER SOUGHT TO INTRODUCE CONSISTING OF STATEMENTS WHICH HAD BEEN MADE WHILE PETITIONER HAD BEEN INJECTED WITH A "TRUTH SERUM."

Petitioner's last argument which, he claims, justifies this Court's review, is that the trial court excluded statements made by petitioner while under the influence of a "truth serum" administered by a person trained in that technique. Respondent has combed the argument of petitioner on this issue and has failed to turn up any hint that this allegation is premised on constitutional protections.

In fact, the issue here presented is strictly an evidentiary one. Petitioner alleges that, despite the infirmities, his statements should have been admitted because these might have been exculpatory. The state argued on direct appeal that the evidence was properly excluded because it would be impossible for the state to cross-examine Zeigler while he was under the influence of the serum. In fact, petitioner sought to introduce a video tape of the statements made while Zeigler was being questioned. The necessity of cross-examination was exceedingly important here since petitioner was never asked whether he killed his wife, his in-laws, or Charles Mays.

(TT-2099) Additionally, the doctor who administered the serum testified that even under the influence of the drug, a person can fabricate facts. (TT-2099)

Petitioner cites to Chambers v. Mississippi, 410 U.S. 284 (1973), to support his position. However, this Court in Chambers explained that there are several exceptions to the hearsay rule that have been carved out because of their inherent reliability. Specifically, in Chambers, the fact that the statement was a declaration against penal interest gave it an indicia of reliability. Zeigler's statements, on the other hand, made under the influence of the truth serum, have no indicia of reliability.

Lastly, this Court has long held that matters of an evidentiary nature will not be reviewed by this Court. In Lisenba v. California, 314 U.S. 219 (1941), this Court stated:

> We do not sit to review state court action on questions of the propriety of the trial judge's action in the admission of evidence.

Id. at 228.

As a result of the foregoing, it is clear that even if review of this matter before this Court was appropriate, petitioner's argument has no merit.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted:

JIM SMITH
Attorney General

George R. Georgieff

GEORGE R. GEORGIEFF
Assistant Attorney General

Gregory C. Smith

GREGORY C. SMITH
Assistant Attorney General

COUNSEL FOR RESPONDENT

The Capitol, 1502
Tallahassee, Florida 32301-8048
(904) 488-0290

No. 81-5908

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

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SUPREME COURT, U.S.

WILLIAM THOMAS ZEIGLER, JR.,

Petitioner,

-v-

STATE OF FLORIDA,

Respondent.

_____/

CAME AND APPEARED BEFORE ME the undersigned authority, George R. Georgieff, Esq., Assistant Attorney General, who first being duly sworn, deposes and says:

That on February 5, 1982, he placed in a United States Post Office box, with first class postage prepaid, one (1) copy of Brief for the Respondent in Opposition, the State of Florida, in the above-referenced case, and that said brief was duly and properly addressed to the Clerk of the United States Supreme Court. Further, he is a duly sworn and authorized member of the bar of this Court.

George R. Georgieff

GEORGE R. GEORGIFFF, Esq.
Assistant Attorney General

STATE OF FLORIDA
COUNTY OF LEON

SWORN AND SUBSCRIBED TO before me this 5th day of February, 1982, at Tallahassee, Leon County, Florida.

Debbie A. Miller

NOTARY PUBLIC, State of Florida at Large

Notary Public, State of Florida at Large
My Commission Expires Oct. 15, 1983
Bonded by American Fire & Casualty Company

Petitioner's Reply Brief

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October Term, 1981

WILLIAM THOMAS ZEIGLER, JR.

PETITIONER

-v.-

STATE OF FLORIDA,

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

PETITIONER'S REPLY MEMORANDUM

ELIZABETH BARTHOLET
CHRISTOPHER F. EDLEY, JR.
1525 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-3101

COUNSEL FOR PETITIONER

No. 81-5908

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-v.-

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PETITIONER'S REPLY MEMORANDUM

IN ATTEMPTING TO DISTINGUISH MINCEY v. ARIZONA, 437 U.S. 385 (1978), THE STATE MISCHARACTERIZES THE EVIDENCE CONCERNING ZEIGLER'S ALLEGED CONSENT TO THE TWELVE-DAY STORE SEARCH, AND ERRONEOUSLY SUGGESTS THAT LEGAL DOCTRINES REGARDING THE VOLUNTARINESS AND SCOPE OF CONSENT CAN BE DISPENSED WITH BECAUSE OF AN ALLEGED COVER-UP SCHEME.

The State of Florida, in its opposing brief, mischaracterizes and confuses facts relevant to the twelve-day warrantless search of Petitioner's store and personal papers. Notwithstanding possible misimpressions created by the State's brief, the record is perfectly clear as to the evidence bearing on Zeigler's alleged consent.

The State bases its argument in large part on a misleading claim that Zeigler "ask[ed] police officers to view the premises." (Brief in Opp., p.5) In fact, the only statement Zeigler made prior to or in connection with this search was the telephone call he made to his friend, off-duty Police Chief Ficke. Ficke related the entire conversation at the suppression hearing:

> "He told me that he had been shot. I said, what happened. He said, please come help me, hurry." (VII, 74)

When the police arrived, Zeigler immediately collapsed and was rushed to the hospital. (See Petition for Cert., pp.3-4)

The State argues further, however, that this desperate message to a friend was actually an invitation to the police which, despite Zeigler's gunshot wound, was voluntary consent to a warrantless search of apparently unlimited scope and duration. The State supports this argument by relying on an elaborate "scheme" theory and extended speculation as to what Zeigler may or may not have thought or predicted when he made the telphone call. (Brief in Opp., pp.3-4, 5)

This argument fails for two reasons. First, in its efforts to justify the warrantless search, the State made no mention of a scheme theory at the suppression hearing or at trial. This alleged scheme is irrelevant as a matter of law to the question of whether the police at the time of the search had, or even could reasonably have believed they had, Zeigler's consent. See, Michigan v. Tyler, 436 U.S. 499, 506 (1978) ("a conviction cannot be used ex post facto to validate the introduction of evidence used to secure that same conviction"); Terry v. Ohio, 392 U.S. 1, 21-22 (1968) (test is whether there were specific and articulable facts, available to the officer at the time, sufficient to justify the intrusion); Petition for Cert., p.12 n.5.

Second, at the time of the search, the police had no basis for concluding that any search was authorized beyond an exigency-related search of the crime scene. Indeed, the State's brief seems to suggest that this familiar type of search is what is at issue. (Brief in Opp., p.3) In fact, however, the record is clear that much crucial evidence was the fruit not of an immediate exigency-related search, but of the extended and intrusive twelve-day expedition. (Petition for Cert., pp.4-6) Understandably, the Respondent does not cite any support for its argument that the alleged scheme justified abandoning any limits on the scope or duration of the warrantless search. (See Brief in Opp., p.5)

In short, this capital case presents a clear, simple and compelling factual record on those matters related to the applicability of Mincey v. Arizona, supra. On such Fourth Amendment issues, this Court has assumed

total responsibility for federal oversight of state court decisions. Stone v. Powell, 428 U.S. 465 (1976). The Petitioner will have no other opportunity to challenge, and the federal courts will have no other opportunity to correct, this clear evasion of the Supreme Court's ruling.

Respectfully submitted,

CHRISTOPHER J. EDLEY, JR.

ELIZABETH BARTHOLET

1525 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-3101